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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 In re: Bard IVC Filters Products Liability  
10 Litigation

No. MDL 15-02641

**PRETRIAL ORDER NO. 3**

11 THIS ORDER RELATES TO ALL  
12 ACTIONS:

(Non-Waiver Order Pursuant to Rule  
502(d) of the Federal Rules of Evidence)

13  
14 **WHEREAS:**

15 (A) The parties seek to resolve disputes related to entries on past and future  
16 privilege logs of Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc.  
17 (collectively “Bard”) withheld pursuant to the attorney-client privilege, the work-product  
18 doctrine, and/or other privileges;

19 (B) In furtherance of this goal, Plaintiffs and Bard have entered into  
20 negotiations, and counsel for the parties are meeting and conferring regularly regarding  
21 Bard’s privilege logs;

22 (C) As part of the meet and confer process, Bard is reviewing certain privilege  
23 log entries identified by Plaintiffs. Bard may provide the Plaintiffs with a small number  
24 of these identified items for inspection from time to time to further the meet and confer  
25 discussions; and

26 (D) As part of the meet and confer process, Bard may choose to withdraw  
27 certain claims of attorney-client privilege, the work-product doctrine, and/or other  
28 privilege(s), and produce the previously withheld items.


1 Therefore, the parties have agreed, and

2 **IT IS ORDERED:**

3 1. The parties' discussions, Bard's disclosure or production of the contents or  
4 copies of the documents or items on its past and/or future privilege logs as part of the  
5 meet and confer process shall not, pursuant to Federal Rule of Evidence 502(d),  
6 constitute any waiver of any privilege and/or work-product protection in this MDL, or in  
7 any other federal or state proceeding.

8 2. This Order does not alter or amend Section VII, Paragraph 31 of the  
9 Stipulated Protective Order (Doc. 269), entitled "Inadvertent Production."

10 Dated this 1st day of December, 2015.

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15 David G. Campbell  
16 United States District Judge  
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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 IN RE: BARD IVC FILTERS PRODUCTS  
10 LIABILITY LITIGATION

MDL No. 2641

11 This Order Relates to: All Actions  
12

13 Defendants C. R. Bard, Inc. and Bard Peripheral Vascular Services, Inc. (“Bard”)  
14 seek a protective order to prevent Plaintiffs from using the December 15, 2004 report of  
15 Dr. John Lehmann. Doc. 306. The issues are fully briefed (Docs. 379, 412), and the  
16 Court heard oral argument on January 29, 2016 (Doc. 507). The Court concludes that no  
17 additional discovery or evidentiary hearing is necessary to resolve this issue. For the  
18 following reasons, the Court will grant Bard’s motion.

19 **I. Background.**

20 The facts in this section are taken largely from testimony given in an evidentiary  
21 hearing in *Alexander v. Bard*, No. 3:12-CV-05187-O-BK (N.D. Tex. June 11, 2014). *See*  
22 Doc. 319-2 at 7-137. The Court will explain later in this order why it finds the testimony  
23 credible.

24 Dr. Lehmann is a consultant who has provided different services to Bard at  
25 different times. Beginning in late 2003, Dr. Lehmann was retained to serve as Bard’s  
26 acting director of medical services. Doc. 319-2 at 93, 107-08. Dr. Lehmann served in  
27 this capacity until Bard hired Dr. David Ciavarella to replace him in May 2004.  
28 Docs. 319-2 at 93-94; 412-1 at 6. As acting medical director, Dr. Lehmann reviewed and

1 approved documents, prepared health hazard evaluations (“HHE”) and remedial action  
2 plans (“RAP”), responded to queries from various medical divisions, and assisted in  
3 Bard’s hiring of Dr. Ciavarella. Doc. 319-2 at 93-96. In this role, Dr. Lehmann drafted  
4 two HHEs that are particularly relevant to this dispute: the March 10, 2004 HHE  
5 (Doc. 445-1 at 4-15), and the April 27, 2004 HHE (Doc. 414 at 3-15), both of which  
6 address Recovery Filter migration events. The Law Department occasionally asked Dr.  
7 Lehmann in his capacity as acting medical director to review medical records for  
8 particular cases. Doc. 319-2 at 30. Once Bard hired Dr. Ciavarella, Dr. Lehmann did not  
9 work on anything related to the Recovery Filter until the Law Department retained his  
10 services in November 2004. *Id.* at 102.

11 In early 2004, Bard began receiving notices of adverse events associated with the  
12 Recovery Filter. For example, in February 2004 Bard learned of a patient death related to  
13 the migration of a Recovery Filter. Docs. 319-2 at 40-41; 445-1 at 5. In April, Bard  
14 learned of a second migration death associated with the filter. Doc. 414 at 4. Bard’s  
15 assistant general counsel, Donna Passero, began to receive letters demanding  
16 compensation from lawyers and patients who had experienced such adverse events. Doc.  
17 319-2 at 25. In June, Passero responded to a letter that raised possible product liability  
18 and medical malpractice claims. Doc. 319-2 at 28-29. In July, Bard notified its  
19 insurance carrier of potential claims involving the Recovery Filter. Docs. 319 at 27-29;  
20 319-2 at 29, 91. These potential claims led the Law Department to retain Dr. Lehmann to  
21 conduct a broad risk assessment of the Recovery Filter. Doc. 319-2 at 38-39.

22 The Law Department retained Dr. Lehmann as a consultant in November 2004.  
23 *Id.* at 2-3, ¶ 6, 93. On November 15, 2004, Dr. Lehmann and Judith Reinsdorf, Bard’s  
24 General Counsel, executed a consulting agreement. Docs. 319-2 at 3, ¶ 8, 36, 94; 335 at  
25 3-9. The agreement said that Dr. Lehmann’s services would be provided in “anticipation  
26 of litigation.” Doc. 335 at 3, ¶ 1. Dr. Lehmann’s work for the Law Department was  
27 unlike the work he had performed as acting medical director; he was retained to provide a  
28 broad assessment of the risks associated with Bard’s Recovery Filter to assist the Law

1 Department in advising Bard on the extent of its legal exposure. Doc. 319-2 at 31-32, 96.  
2 Dr. Lehmann reviewed relevant medical literature, examined the Recovery Filter  
3 complaints Bard had received up to that point, analyzed data from the FDA's adverse  
4 event reporting database (known as "MAUDE"), reviewed bench testing data for the  
5 Recovery Filter and its competitors, and prepared a written report of his findings.  
6 Docs. 319-2 at 97-98; 335 at 9. During this investigation, and at Passero's direction, Dr.  
7 Lehmann communicated with "a small and limited number of Bard employees for the  
8 purpose of obtaining and providing information in order to" complete his work.  
9 Doc. 319-2 at 3, ¶ 10.

10 On December 15, 2004, Dr. Lehmann submitted his report ("Report") to Passero.  
11 Docs. 319-2 at 3, ¶ 11, 98, 104-05; 335 at 3, ¶ 2, 11. The Report contained a header on  
12 every page stating that it was "[p]rivileged and confidential," "[a]ttorney work product,"  
13 and "[p]ursuant to contract." *See, e.g.*, Doc. 335 at 13. Passero distributed the Report to  
14 five Bard employees, including Bard's general counsel. Doc. 319-2 at 3, ¶ 11, 36, 83.  
15 Eventually, the Report was distributed to approximately 12 Bard employees.<sup>1</sup> *See id.* at  
16 140-41, ¶¶ 3-4. Passero testified that she distributed the Report internally because it  
17 recommended that Bard immediately and urgently address several issues. *Id.* at 37; *see*  
18 *also id.* at 3, ¶ 11. Passero instructed the recipients "that the report and associated  
19 materials were confidential and that any further distribution of the report should be  
20 limited to only those employees or consultants who need the report to perform their  
21 proper job functions." *Id.* at 3, ¶ 11, 83. There is no evidence that the Report was  
22 distributed to anyone other than Bard employees.

## 23 **II. Legal Standard.**

24 "A party or any person from whom discovery is sought may move for a protective  
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26 <sup>1</sup> The record does not clearly establish how the remaining Bard employees  
27 received the Report. Presumably, the individuals to whom Passero gave the Report  
28 passed it along to others. *See* Doc. 319-2 at 3, ¶ 11. The record is similarly unclear as to  
the identities of the 12 Bard employees who received the Report, although Bard's  
briefing suggests that it is the 12 individuals named in Robert Carr's February 3, 2014  
affidavit. *See* Doc. 306 at 9, 16; *see also* Doc. 319-2 at 140-41, ¶¶ 3-4.

1 order in the court where the action is pending.” Fed. R. Civ. P. 26(c)(1). Rule 26(c)  
2 authorizes a district court to grant a protective order where “good cause” is shown. *See*  
3 *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999).  
4 “[T]he party seeking protection bears the burden of showing specific prejudice or harm  
5 will result if no protective order is granted.” *Phillips v. G.M. Corp.*, 307 F.3d 1206,  
6 1210-11 (9th Cir. 2002) (quotation marks and citations omitted).

### 7 **III. Analysis.**

8 Bard argues that (1) the Report is protected from disclosure by the work product  
9 doctrine; (2) Plaintiffs have not shown a substantial need for the Report, or that they will  
10 experience an undue hardship in obtaining substantially equivalent information; and  
11 (3) Bard did not waive the Report’s work-product protection. The Court will explain  
12 why it agrees with these three assertions.

#### 13 **A. The Report is protected work product.**

14 “Ordinarily, a party may not discover documents and tangible things that are  
15 prepared in anticipation of litigation or for trial by or for another party or its  
16 representative (including the other party’s attorney, *consultant*, surety, indemnitor,  
17 insurer, or *agent*).” Fed. R. Civ. P. 26(b)(3)(A) (emphasis added). Courts in the Ninth  
18 Circuit use the “because of” test to determine whether dual purpose documents were  
19 prepared in anticipation of litigation:

20 In circumstances where a document serves a dual purpose, that is, where it  
21 was not prepared exclusively for litigation, then the “because of” test is  
22 used. Dual purpose documents are deemed prepared because of litigation if  
23 in light of the nature of the document and the factual situation in the  
24 particular case, the document can be fairly said to have been prepared or  
25 obtained because of the prospect of litigation. In applying the “because of”  
26 standard, courts must consider the totality of the circumstances and  
determine whether the document was created because of anticipated  
litigation, and would not have been created in substantially similar form but  
for the prospect of litigation.

27 *United States v. Richey*, 632 F.3d 559, 567-68 (9th Cir. 2011) (quotation marks and  
28 citations omitted).

1 Before the start of this MDL, Passero and Lehmann testified in an evidentiary  
2 hearing in the *Alexander* case cited above. See Doc. 319-2 at 7-137. Attorneys who are  
3 part of the Plaintiffs' Steering Committee in this MDL participated in the hearing and  
4 cross-examined Passero and Lehmann. *Id.* at 9. Bard relies on affidavits, documentary  
5 evidence, and testimony from the *Alexander* hearing to show that the Report was created  
6 because of anticipated litigation. See Doc. 306 at 9-13.

7 Documents confirm that, beginning in early 2004, Bard and its legal counsel began  
8 receiving notices that the Recovery Filter was associated with adverse events, including  
9 several deaths. See Docs. 319 at 14-25 (letters and emails involving lawyers and patients  
10 who had experienced adverse events associated with the Recovery Filter); *id.* at 31-80  
11 (Bard complaint files for patients who had experienced adverse events associated with the  
12 Recovery Filter); 319-1 at 1-230 (same). Bard received several threats of litigation.  
13 Doc. 319 at 14-16 (February 3, 2004); *id.* at 20-21 (June 7, 2004); *id.* at 23 (June 15,  
14 2004). In July 2004, Bard notified its insurance carrier of potential claims relating to the  
15 Recovery Filter. Docs. 319 at 27-29; 319-2 at 29, 91. Plaintiffs do not dispute this  
16 documentation.

17 Ms. Passero stated in an affidavit and during her testimony in *Alexander* that these  
18 events caused the Law Department to retain Dr. Lehmann as a consultant to conduct a  
19 broad risk assessment. Doc. 319-2 at 2 (¶¶ 6-7), 32. Dr. Lehmann confirmed this fact in  
20 his testimony. *Id.* at 93-95.

21 The consulting agreement was executed by Dr. Lehmann and Bard's general  
22 counsel, and provided that Dr. Lehmann would report directly to, and take directions  
23 from, attorney Passero and the Law Department. Docs. 319-2 at 3, ¶ 9, 36, 94; 335 at 3-  
24 9. The agreement stated that Dr. Lehmann's services were being retained in "anticipation  
25 of litigation." Doc. 335 at 3, ¶ 1. Dr. Lehmann's Report was submitted directly to  
26 Passero. Docs. 319-2 at 3, ¶ 11, 98, 104-05; 335 at 3, ¶ 2, 11. The Report contained a  
27 header stating that it was "[p]rivileged and confidential," "[a]ttorney work product," and  
28 "[p]ursuant to contract." See, e.g., Doc. 335 at 13.

1 Plaintiffs argue that the Report was prepared in the ordinary course of business.  
2 *See* Doc. 379 at 12-19. They assert that Bard’s regular business includes remedial actions  
3 and “significant obligations to investigate and to report product failures, including  
4 conducting comparisons to competitor products.” *Id.* at 13. Plaintiffs point to Bard’s  
5 Regulatory Affairs Manual (Doc. 445-2 at 11-26, 35-53) and various statutes and  
6 administrative regulations as proof of these obligations. *See* Doc. 379 at 5-6, 13-14.  
7 Plaintiffs contend that Bard’s Regulatory Affairs Manual establishes that Dr. Lehmann  
8 was a member of Bard’s Product Assessment Team when he was serving as acting  
9 medical director. *Id.* at 13-14. Even if this is true, Plaintiffs fail to link this fact to Dr.  
10 Lehmann’s work in preparing the Report – work that was conducted months later and in  
11 his capacity as a consultant for the Law Department.

12 It is true that the statutes and regulations impose on Bard certain obligations: to  
13 maintain complaint and adverse event files (*see* 21 C.F.R. §§ 820.198, 803.1), investigate  
14 and report to the FDA certain product failures (*see* 21 C.F.R. § 820.198), undertake  
15 certain duties with respect to misbranded or adulterated devices (*see* 21 U.S.C. §§ 321,  
16 331, 351, 352, 360), and perform quality audits (*see* 21 C.F.R. § 820.22). But these laws  
17 do not impose an obligation to conduct the extensive and comparative statistical and  
18 bench testing data analyses undertaken by Dr. Lehmann and memorialized in the Report.  
19 Both Passero and Dr. Lehmann testified that the Report was an unusual undertaking,  
20 prepared in anticipation of litigation and unrelated to Bard’s regulatory obligations. *See*  
21 Doc. 319-2 at 33-34, 38, 93-98, 108-10, 113-17. Even considering and crediting  
22 Plaintiffs’ evidence, the Court finds these assertions largely un rebutted. The Report was  
23 a more extensive and detailed analysis than Bard normally created. The evidence does  
24 not support Plaintiffs’ assertion that the Report was prepared in the ordinary course of  
25 Bard’s business. It supports a finding that the Report “would not have been created in  
26 substantially similar form but for the prospect of litigation,” *Richey*, 632 F.3d at 568,  
27 which satisfies the Ninth Circuit’s work product test.<sup>2</sup>

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28 <sup>2</sup> At oral argument, the Court asked Plaintiffs to cite the specific statute or



1 Plaintiffs also argue that the Report was used for Bard's business purposes, and  
2 that there is no evidence it was used for litigation purposes. Doc. 379 at 14-15. Plaintiffs  
3 identify three internal Bard documents that contain information from the Report: the  
4 December 12, 2004 HHE, the January 4, 2005 RAP, and a December 9, 2004 draft of the  
5 January RAP. *Id.* at 14. A review of these documents confirms that the Report was used  
6 in creating them. Bard also admitted this fact during oral argument and in its reply brief.  
7 Doc. 412 at 7. But use of the Report to create internal HHEs and RAPs does not deprive  
8 the Report of work product protection. To the contrary, the "because of" test is directed  
9 at documents that serve both litigation and business purposes. *See Richey*, 632 F.3d at  
10 567-68 ("In circumstances where a document serves a dual purpose, that is, where it was  
11 not prepared exclusively for litigation, then the 'because of' test is used."). The Court  
12 must determine whether "the document was created because of anticipated litigation, and  
13 would not have been created in substantially similar form but for the prospect of  
14 litigation." *Id.* at 568. As discussed in this order, the evidence supports such a finding.

15 Plaintiffs also cite no authority for their argument that Bard must show the Report  
16 was actually used in litigation. The test is whether the Report was "*prepared in*

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18 regulation that they claim required Bard to produce the Report. Plaintiffs cited 21 C.F.R.  
19 § 820.22. The Court has closely reviewed this regulation, as well as related regulations,  
20 and concludes that § 820.22 did not require Bard to create the Report. First, § 820.22  
21 focuses on quality systems. *Id.* ("Each manufacturer shall *establish procedures for*  
22 *quality audits* and conduct such audits to assure that the *quality system is in compliance*  
23 *with the established quality system requirements* and to *determine the effectiveness of the*  
24 *quality system.*") (emphasis added). "Quality system" is defined as "the organizational  
25 structure, responsibilities, procedures, processes, and resources for implementing quality  
26 management." *Id.* § 820.3(v). This suggests that the quality audits mentioned in § 820.22  
27 are focused on ensuring that manufacturers have proper quality assurance procedures in  
28 place and are, in fact, following those procedures. Second, the FDA's comments in the  
preamble to the regulation confirm that this is the purpose of § 820.22. *See* 61 Fed. Reg.  
52602, 52614 (Oct. 7, 1996) ("Quality audit[s] are for an internal audit and review of the  
quality system to verify compliance with the quality system regulation. The review and  
evaluations under § 820.22 are very focused. During the internal quality audit, the  
manufacturer should review all procedures to ensure adequacy and compliance with the  
regulation, and determine whether the procedures are being effectively implemented at all  
times."). Third, the regulatory structure indicates that § 820.22 is focused on procedures  
and processes, rather than on a particular product's safety. The regulation is located in  
Subpart B "Quality System Requirements," and not in other subparts that more directly  
address the subject matter of the Report, such as Subpart G "Production and Process  
Controls," Subpart I "Nonconforming Product," or Subpart J "Corrective and  
Preventative Action."

1 anticipation of litigation,” not whether it was used in litigation. Fed. R. Civ. P. 26(b)(3)  
2 (emphasis added). Requiring parties to show that a document was used in litigation  
3 would likely invade both the work product protection and the attorney-client privilege.

4 Plaintiffs similarly argue that the Report does not mention litigation, legal  
5 analysis, or litigation strategy. But work product protection is not limited to legal  
6 analysis or litigation strategy – it includes “documents and tangible things that are  
7 prepared in anticipation of litigation . . . for another party or its representative,” including  
8 by its “consultant” or “agent.” *Id.*; see *Richey*, 632 F.3d at 567 (“The work-product  
9 doctrine covers documents or the compilation of materials prepared by agents of the  
10 attorney in preparation for litigation.”). Thus, a purely technical analysis of a Bard filter  
11 prepared by one of Plaintiffs’ consulting experts in anticipation of litigation would be  
12 work product regardless of whether it included litigation strategy or legal analysis.  
13 Indeed, when work product must be disclosed under Rule 26 for substantial need, courts  
14 are directed to withhold “mental impressions, conclusions, opinions, or legal theories of a  
15 party’s attorney or other representative concerning the litigation,” making clear that work  
16 product includes more than this kind of legal analysis. Fed. R. Civ. P. 26(b)(3)(B).

17 Plaintiffs contend that the Report is not work product because litigation was not  
18 “imminent.” Doc. 379 at 16-17. But Plaintiffs cite no authority for the proposition that  
19 work product protection applies only when litigation is imminent. The test is whether  
20 litigation was reasonably anticipated, and the adverse events and litigation threats of 2004  
21 clearly satisfied this requirement.

22 Plaintiffs also argue that Bard did not reasonably anticipate litigation when it  
23 retained Dr. Lehmann because Bard had not yet implemented a litigation hold on  
24 documents and electronically stored information. *Id.* at 16. But even if Bard failed to  
25 implement a timely litigation hold as Plaintiffs contend – an issue the Court does not  
26 decide at this time – that fact would not prove that litigation was not reasonably  
27 anticipated. Parties can fail to comply with preservation obligations in the face of  
28 reasonably anticipated litigation. Plaintiffs do not dispute that deaths and injuries from

1 the Recovery Filter had been reported in 2004, that Bard had received demands for  
2 compensation, or that Bard had put its insurance carrier on notice of possible claims. The  
3 totality of the circumstances clearly shows that litigation was reasonably anticipated.

4 Plaintiffs argue that the Report was prepared in the ordinary course of business  
5 because “Dr. Lehmann’s work was well underway long before he was given a contract  
6 with the Law Department.” Doc. 379 at 17. While there is no dispute that Dr. Lehmann  
7 worked as Bard’s acting medical director in late 2003 and early 2004, Dr. Lehmann  
8 testified in the *Alexander* hearing that this role terminated on the hiring of Dr. Ciavarella  
9 in May 2004 and that, other than occasional communications with Dr. Ciavarella, he  
10 performed no work for Bard until November 2004. Doc. 319-2 at 93-98. Dr. Lehmann  
11 also testified that the work he performed as acting medical director was substantially  
12 different from the work done to produce the Report. *Id.* Plaintiffs present no direct  
13 evidence to contradict this testimony. Plaintiffs instead identify several documents as  
14 indirect evidence that Dr. Lehmann’s work as acting medical director was related to his  
15 Law Department work that culminated in the Report: the March 10, 2004 HHE (Doc.  
16 445-1 at 4-15); an April 15, 2004 email (Doc. 443-1 at 5-8); and the April 27, 2004 HHE  
17 (Doc. 414 at 3-15).

18 Dr. Lehmann’s testimony directly addressed the differences between these HHEs  
19 and the Report. Dr. Lehmann testified that: HHEs were prepared pursuant to Bard’s  
20 regulatory obligations, while the Report was not; the purpose of HHEs was to “guide  
21 potential market actions or corrections,” while the purpose of the Report was to provide  
22 guidance on Bard’s risk and overall exposure from adverse events associated with the  
23 Recovery Filter; HHEs considered a product’s risks and benefits, while the Report  
24 considered only the Recovery Filter’s risks; HHEs each focused on a single adverse event  
25 involving migration, while the Report dealt with all adverse events associated with the  
26 Recovery Filter; and the Report involved detailed statistical analysis personally  
27 performed by Dr. Lehmann, while HHEs did not. *See* Doc. 319-2 at 96-98. The Court’s  
28 close review of the HHEs and the Report confirms these distinctions.

1 The four-page HHE dated March 10, 2004 was prepared by Dr. Lehmann after the  
2 February 2004 death of a patient due to the migration of a massive blood clot and a  
3 Recovery Filter to the patient's heart.<sup>3</sup> Doc. 445-1 at 5. The HHE focused on this single  
4 adverse event and discussed the placement of the filter, the patient's risk factors, the  
5 autopsy report, and other medical evidence. *Id.* at 5-6. The HHE included a short review  
6 of other Recovery Filter migration complaints. *Id.* at 6. The HHE then addressed the  
7 following subjects: human exposure to the problem, general consequences, population  
8 exposed to risk, mitigating or predisposing factors, nature and seriousness of the risk,  
9 likelihood of occurrence, likelihood of harm, whether the product is essential to health,  
10 whether there are available alternatives, whether the problem must be corrected  
11 surgically, whether the problem is expected and within an acceptable statistical range,  
12 whether the problem can be field corrected, whether the problem is obvious to the user,  
13 whether the product can continue to be used with proper warnings, and whether the  
14 device is used only by specially-trained health care professionals. *See id.* at 6-8. The  
15 HHE concluded that "[t]here have been 3 migrations of the Recovery VC Filter in which  
16 the device ended up in or near the heart, with one fatality, in an estimated 6,402 sales  
17 through March 2, 2004, for a rate of 0.05%." *Id.* This is the only statistical calculation in  
18 the HHE, and includes a warning that comparative assessments using data from "the  
19 MAUDE database do not yield reliable quantitative estimates." *Id.* With respect to  
20 whether the problem is expected and within an acceptable statistical range, the HHE  
21 stated that "[e]stimates based on MAUDE and sales data suggest that there is no  
22 significant difference in the rates of these complications between devices, including the  
23 Recovery" Filter. *Id.* at 8.

24 The Report has a broader focus. It contains statistical analyses relating to selected  
25 types of adverse events associated with the Recovery Filter and other filters on the  
26 market, including rates of reported filter fractures, caval perforation, filter movement,  
27 filter embolization, and filter embolization deaths. Doc. 335 at 13. Using MAUDE data,

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28 <sup>3</sup> The April 27, 2004 HHE is similar to the March HHE in all relevant respects.

1 actual sales data for the Recovery Filter, and estimated sales data for other filters, the  
2 Report calculates and compares adverse event reporting rates for the Recovery Filter and  
3 seven other types of filters. *Id.* at 19-20. The Report then uses the reporting rates to  
4 calculate relative risks for each of the eight filters for different types of adverse events.  
5 *Id.* at 21-27. The Report also reviews Bard's bench testing data that was used to  
6 determine migration resistance for each of the eight filters, and compares the bench data  
7 to the frequency of adverse events reported in the MAUDE data base. *Id.* at 31-33. The  
8 Report concludes that "[t]his data and analysis provides two significant signals (MAUDE  
9 rates and bench test data) that further investigation of the Recovery VCF filter  
10 performance in relation to migration and fracture is urgently warranted." *Id.* at 16. This  
11 is a different focus than the HHEs. True, there are some similarities between the HHEs  
12 and the Report, but the documents clearly serve different purposes and their substantial  
13 differences corroborate Dr. Lehmann's testimony that the Report was a different  
14 undertaking than the work he did as acting medical director.

15 In the April 15, 2004 email relied on by Plaintiffs, Dr. Lehmann stated that  
16 "[c]omparison with other filters is problematic in many ways, and we should avoid /  
17 downplay this as much as possible." Doc. 443-1 at 5. Plaintiffs argue that this statement  
18 shows that Dr. Lehmann performed the same work as acting medical director that he did  
19 in preparing the Report. But the fact that Dr. Lehmann – or others within Bard – did  
20 some comparisons with other filters while he was acting as Bard's medical director does  
21 not prove that the detailed statistical analysis and evaluation of bench-testing results  
22 contained in the Report were done before his contract with the Law Department or for  
23 another reason. Nor have Plaintiffs cited any authority for the proposition that work  
24 product is not entitled to protection if it is similar in some way to work the person has  
25 done before. Rather, the test is whether the Report "would not have been created in  
26 substantially similar form but for the prospect of litigation." *Richey*, 632 F.3d at 568.  
27 After examining the HHEs and the April 2004 email, and comparing them with the  
28 Report, the Court finds that they do not undercut the testimony of Dr. Lehmann that the

1 Report was prepared at the behest of the Law Department and would not have been  
2 created in substantially similar form otherwise.

3 Finally, Plaintiffs cite language from the December 2004 draft RAP which states  
4 that Dr. Lehmann “was commissioned by *Corporate Senior Management* to provide an  
5 independent study of the risk/benefit of the [Recovery Filter] in bariatric patients.”  
6 Doc. 379 at 9 (emphasis added by Plaintiffs). Plaintiffs argue that this proves Dr.  
7 Lehmann was hired by the business, not by the legal department, to prepare the Report.  
8 But Dr. Lehmann’s consulting contract was signed by Judith Reinsdorf, Bard’s Vice  
9 President, General Counsel, and Secretary. Doc. 335 at 8. She clearly qualified as  
10 “Corporate Senior Management,” as stated in the draft RAP. She also was Bard’s lead  
11 in-house lawyer. The Court cannot conclude that the statement in the draft RAP is  
12 somehow inconsistent with the fact that the Report was prepared at the request of the  
13 Law Department and in anticipation of litigation.<sup>4</sup>

14 In summary, the Court finds that the clear threat of litigation in 2004, Dr.  
15 Lehmann’s retention by the Law Department in November of that year, the contract he  
16 signed with Bard’s general counsel, the scope of work to be performed under the contract,  
17 and the clear labeling of the Report as work product all support a finding that the Report  
18 was prepared because of anticipated litigation. Dr. Lehmann testified that his work in  
19 late 2003 and early 2004 as acting medical director was different than the work he did  
20 under the contract, and the documents cited by Plaintiffs do not undercut that testimony.  
21 To be sure, there are some general similarities between the HHEs and the Report, and the  
22 Report was used for some business purposes, but these facts do not contradict the clear  
23 evidence that the Report “would not have been created in substantially similar form but  
24 for the prospect of litigation.” *Richey*, 632 F.3d at 568. The Court finds no evidence to  
25 support Plaintiffs’ suggestion that the work product label for the Report was some kind of

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26  
27 <sup>4</sup> What is more, this language did not appear in the January 4, 2005 final version of  
28 the RAP. See Doc. 306-1 at 43-44 (“As part of the ongoing evaluation of [the Recovery  
Filter], Bard requested an independent study of the risks and benefits of the [Recovery  
Filter], with an emphasis on its use in bariatric surgery and trauma patients.”).



1 grand ruse, implemented to hide unfavorable information. Based on the totality of the  
2 circumstances, the Court concludes that the Report was prepared “because of” anticipated  
3 litigation and is protected by the work-product doctrine. Fed. R. Civ. P. 26(b)(3)(A);  
4 *Richey*, 632 F.3d at 567-68.

5 **B. Plaintiffs have not shown substantial need or undue hardship.**

6 Work product protection is not absolute. A protected but otherwise discoverable  
7 document may be obtained in discovery if “the party shows that it has substantial need  
8 for the materials to prepare its case and cannot, without undue hardship, obtain their  
9 substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A). The Advisory  
10 Committee has made clear that a “special showing” is required. *See Bickler v. Senior*  
11 *Lifestyle Corp.*, 266 F.R.D. 379, 384 (D. Ariz. 2010) (citing Fed. R. Civ. P. 26(b)(3)  
12 advisory committee’s note (1970)).

13 Bard argues that Plaintiffs have full access to all of the data analyzed in Dr.  
14 Lehmann’s Report and that their experts can – and already have in some of the  
15 consolidated cases – perform the same analysis. Plaintiffs do not disagree, but instead  
16 attempt to show their substantial need by arguing this:

17 Yes, Plaintiffs can analyze the same data Dr. Lehmann did. Plaintiffs in  
18 other cases have even hired experts to do the same work. But Plaintiffs  
19 should not be required to present the evidence in this cumbersome fashion  
20 and incur the expense and delay associated with hiring an independent  
21 expert simply to show what Bard knew as of December 2004 and  
22 communicated to several high-ranking officials in its corporation. The  
23 Report does all of that. Why waste days of trial (in every MDL case  
24 remanded for trial) with the concomitant strain on judicial and party  
25 resources to employ, prepare, present, and depose experts, along with the  
26 inevitable *Daubert* hearing exercise, when all that same information is in  
27 one report provided to several Bard employees primarily used to comply  
28 with Bard’s reporting requirements to the FDA?

Doc. 379 at 28.

26 The Court finds this argument wholly unpersuasive. Plaintiffs essentially concede  
27 that they can create the substantial equivalent of the Report through their own experts,  
28 but argue – in this substantial and well-funded MDL proceeding – that they should not be

1 put to the time and expense of retaining their own experts. If this were a sufficient  
2 “special showing” to overcome work product protection, *Bickler*, 266 F.R.D. at 384, the  
3 protection would be lost in every case where the opposing side would have to expend  
4 meaningful resources to obtain the substantial equivalent of the work product. This is not  
5 the law. *See, e.g., Fletcher v. Union Pac. R.R. Co.*, 194 F.R.D. 666, 671 (S.D. Cal. 2000)  
6 (citing 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §  
7 2025, at 374, n.15 (3d ed. 2015)) (finding “mere[] expense or inconvenience” insufficient  
8 to constitute undue hardship).

9 Plaintiffs asserted during oral argument that there is a fact they cannot prove  
10 through their own experts: that Bard *knew* of Dr. Lehmann’s unfavorable conclusions.  
11 But Plaintiffs’ briefing on this issue suggests otherwise: “Plaintiffs should not be  
12 required to . . . incur the expense and delay associated with hiring an independent expert  
13 simply to show what Bard *knew* as of December 2004.” Doc. 379 at 28 (emphasis  
14 added). What is more, Plaintiffs’ briefing includes many cites to evidence they claim  
15 shows that Bard knew about the problems arising from its filters, including a statement in  
16 which Dr. Lehmann, in his role as acting medical director, allegedly was urging Bard to  
17 downplay the problem. *See* Doc. 443-1 at 5 (“Bottom line: good filter, severe case, bad  
18 outcome, deep regret. This is the simple story we should repeat again and again.  
19 Comparison with other filters is problematic in many ways, and we should avoid /  
20 downplay this as much as possible.”). Plaintiffs asserted in oral argument that Dr.  
21 Lehmann’s report would make this point even more credibly, but the Court cannot  
22 conclude that enhanced credibility satisfies the special showing required to overcome  
23 work product protection. *See Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir.  
24 2000) (“A party also does not demonstrate substantial need when it merely seeks  
25 corroborative evidence.”).

26 It is undisputed that Plaintiffs have access to the same data that Dr. Lehmann  
27 relied on in creating the Report. Docs. 306 at 14; 379 at 28. Further, “Plaintiffs in other  
28 cases have even hired experts to do the same work.” Doc. 379 at 28; *see* Doc. 319-2 at



1 143-64 (expert report of Dr. Michael Freeman). Plaintiffs have not made the showing of  
2 substantial need or undue hardship required to overcome the Report's work product  
3 protection.

4 **C. Bard did not waive the Report's work product protection.**

5 Plaintiffs argue that Bard waived any claim to work product protection by  
6 (1) internal distribution of the report to 12 Bard employees, (2) disclosure of the report in  
7 the *Phillips* trial in the District of Nevada, (3) attempting to use work product protection  
8 as both a sword and a shield, and (4) using the Report in furtherance of a crime or fraud.  
9 *See* Doc. 379 at 20-27. The Court will address each argument separately.

10 **1. Internal distribution of the Report.**

11 "Courts have recognized that work product protection may be lost when the  
12 disclosure substantially increases the opportunity for potential adversaries to obtain the  
13 information." *Bickler*, 266 F.R.D. at 384 (quotation marks and citation omitted). Bard  
14 contends that its distribution of the Report to 12 internal employees did not substantially  
15 increase the opportunity for Plaintiffs to obtain the Report. The Court agrees.

16 Passero distributed the Report to five people, including Bard's general counsel,  
17 with instructions that it was confidential and distribution "should be limited." Doc. 319-2  
18 at 3, ¶ 11, 36-37. Passero testified that she distributed the report internally because the  
19 Report recommended that Bard promptly take certain steps and she thought it important  
20 to give it "to people who would know what to do with that information." *Id.* at 37.  
21 Eventually, the Report was distributed to a total of 12 Bard employees. *See* Doc. 319-2  
22 at 140-41, ¶¶ 3-4.

23 Plaintiffs argue that the Report was circulated without restrictions. They cite  
24 deposition testimony of Dr. Ciavarella that "he received the Report 'without restriction'  
25 as to its use," and that he was "*never instructed that the Report was secret or prepared in*  
26 *anticipation of litigation.*" Doc. 379 at 10 (emphasis by Plaintiffs). Plaintiffs' Exhibit 5  
27 contains several pages of Dr. Ciavarella's deposition transcript, but none of them contains  
28 this testimony. *See* Doc. 445-2 at 1-9. The Court therefore cannot consider Ciavarella's

1 statement in context. But even if it was made as quoted by Plaintiffs and is accepted as  
2 true, the Court cannot conclude that one high-level employee's receipt of the Report  
3 without Passero's restrictions substantially increased the risk that the Report would be  
4 distributed outside of Bard. Every page of the Report was labeled "[p]rivileged and  
5 confidential" and "[a]ttorney work product." Doc. 335 at 13-46. In addition, Bard's  
6 internal policies state that communications between Bard's legal counsel and its  
7 employees are to be kept confidential, as are documents created in anticipation of  
8 litigation. Doc. 319-2 at 2, ¶ 5.

9 The Court concludes that Bard's internal distribution of the Report to 12  
10 employees did not substantially increase the opportunity for Plaintiffs or others outside of  
11 Bard to obtain the Report. *Bickler*, 266 F.R.D. at 384.

## 12 **2. Disclosures of the Report in the *Phillips* trial.**

13 Courts have been willing to preserve a document's work product protection where  
14 an earlier disclosure of the document was compelled. *Bickler*, 266 F.R.D. at 384 (citation  
15 omitted); *see also Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989)  
16 ("When a party is compelled to disclose privileged work product and does so only after  
17 objecting and taking other reasonable steps to protect the privilege, one court's disregard  
18 of the privileged character of the material does not waive the privilege before another  
19 court."). In *Phillips v. Bard*, No. 3:12-CV-344-RCJ-WGC (D. Nev. Feb. 2, 2015), the  
20 Report was admitted into evidence during trial over Bard's work product objection. *See*  
21 Doc. 306-1 at 150-55; 159-60. Bard argues that this compelled disclosure did not amount  
22 to waiver. The Court agrees.

23 Bard took reasonable steps to protect the Report's confidential nature during the  
24 *Phillips* trial. Bard objected to the Report's use at trial, argued against its admission  
25 during a hearing in the middle of trial, and objected again when the Report was actually  
26 introduced in evidence. *See* Doc. 306-1 at 150-55, 159-60. The Court is not persuaded  
27 by Plaintiffs' argument that "Bard failed to timely request that [the] Report (and other  
28 trial exhibits) be sealed." Doc. 379 at 27. Bard actively opposed the use of the Report

1 during trial and moved to seal the Report at the conclusion of the trial. Doc. 412 at 15.  
2 Bard's compelled disclosure was not a waiver of its work product protection. *Bickler*,  
3 266 F.R.D. at 384; *Shields*, 864 F.2d at 382.

### 4 **3. Sword and shield argument.**

5 The attorney-client privilege and work product protection may not be used as both  
6 a sword and a shield. "Where a party raises a claim which in fairness requires disclosure  
7 of the protected communication, the privilege may be implicitly waived." *Columbia*  
8 *Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196  
9 (9th Cir. 2001) (quotation marks and citations omitted).

10 Plaintiffs assert that Bard has selectively quoted the Report in several documents,  
11 including the December 17, 2004 HHE (Doc. 306-1 at 52-56) and the January 4, 2005  
12 RAP (*id.* at 39-50). Both the HHE and the RAP do repeat the Report's findings that the  
13 Recovery Filter was experiencing significantly higher reporting rates of adverse events  
14 than comparable filters. *See id.* at 44, 53. The documents also convey some of the  
15 Report's limitations, such as the lack of reliable data and the need to conduct follow-up  
16 research. *See id.* But Plaintiffs do not show how this use of the Report constitutes a  
17 sword. The sword-shield rulings stand for basic fairness – a party should not be allowed  
18 to use work product affirmatively to gain some advantage in litigation, and at the same  
19 time withhold the work product from scrutiny by asserting the work product protection.  
20 The use of data and conclusions from the Report in internal Bard documents, such as the  
21 RAPs and the HHEs, does not amount to such affirmative use, and fairness therefore does  
22 not demand disclosure of the full document.

23 Plaintiffs also point to representations that Bard made to "the FDA and the  
24 medical community that the Recovery [Filter] failed at the same rate as competition  
25 models while knowing from the Report that this was not true." Doc. 379 at 21-22 (citing  
26 Doc. 443-1 at 5-8). For support, Plaintiffs cite an April 15, 2004 email from Dr.  
27 Lehmann. Doc. 443-1 at 5-8. But this email does not support Plaintiffs' position. At the  
28 time, Dr. Lehmann could not have known from the Report that the Recovery Filter was

1 failing at higher rates than its competitors because the Report had not been created – it  
2 was not issued for another eight months. What is more, making a public statement  
3 contrary to what is contained in work product does not constitute use of the work product  
4 as a sword. The work product is not used at all in such a communication. The work  
5 product may contradict the public statement, but the sword-shield basis for waiver does  
6 not turn on impeachment value; it turns on the unfairness of using a document to make an  
7 affirmative assertion for one’s advantage while simultaneously withholding the document  
8 from scrutiny. Dr. Lehmann’s email did not do that.

#### 9 **4. Crime-fraud exception.**

10 The attorney-client privilege and work product protection do not apply to  
11 communications made or work done in furtherance of a crime or fraud. *In re Grand Jury*  
12 *Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996); *United States v. Zolin*, 491 U.S. 554, 562-  
13 63 (1989); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 n.2 (2d Cir. 1995) (work product). A  
14 party that invokes the crime-fraud exception must show that: (1) “the client was engaged  
15 in or planning a criminal or fraudulent scheme when it sought the advice of counsel to  
16 further the scheme,” and (2) the work product was sufficiently related to and was made in  
17 furtherance of the intended, or present, continuing illegality. *In re Napster, Inc.*  
18 *Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007) (quotation marks and citations  
19 omitted), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100  
20 (2009).

21 Plaintiffs argue that the crime-fraud exception can be established merely by  
22 showing “reasonable cause” to believe that the legal services were used to promote an  
23 unlawful scheme. Doc. 379 at 22. But the case law cited by Plaintiffs concerns grand  
24 jury proceedings, and the Ninth Circuit has noted that there is reason to apply a lower  
25 standard in such proceedings – which require speed and simplicity – than in civil cases.  
26 *In re Napster*, 479 F.3d at 1094. The Ninth Circuit has held that a party in a civil case  
27 must establish the crime-fraud exception by a preponderance of the evidence when  
28 challenging attorney-client communications. *Id.* at 1094-95 (“For several reasons, we

1 conclude that in a civil case the burden of proof that must be carried by a party seeking  
2 outright disclosure of attorney-client communications under the crime-fraud exception  
3 should be preponderance of the evidence.”). Plaintiffs do not address this holding, nor do  
4 they provide reason for the Court to conclude that a different standard should apply to  
5 work product protection. The Court concludes that the preponderance of the evidence  
6 standard should be applied to this work product challenge.<sup>5</sup>

7 In an opening footnote on this issue, Plaintiffs cite a recall of another Bard product  
8 in 1990, criminal charges brought in 1993 against Bard related to other products, two  
9 MDL proceedings against Bard, and Bard’s settlement of a qui tam lawsuit. Doc. 379 at  
10 23-24 n.15. Plaintiffs provide no evidence linking these events to this case. Moreover,  
11 the crime-fraud exception does not apply to past conduct. *Zolin*, 491 U.S. at 562-63.

12 Plaintiffs assert that Bard committed a “cover up of adverse testing, injuries, and  
13 deaths associated with its filters,” which they contend is both fraudulent and criminal.  
14 Doc. 379 at 24. Plaintiffs produce the following evidence: Bard learned of the first  
15 reported death associated with the Recovery Filter in February 2004; in response, Bard  
16 formed a Crisis Communication Team; in April 2004, a Bard executive emailed Dr.  
17 Lehmann expressing concern about the Recovery Filter’s mortality rate; in July 2004,  
18 Bard issued an HHE that showed the Recovery Filter had a failure rate 28 times higher  
19 than other filters; the Report showed high rates of adverse events associated with the  
20 Recovery Filter; and witnesses have testified about the Recovery Filter’s high rate of  
21 adverse events. *Id.* at 24-25. Plaintiffs assert that Bard committed fraud by not reporting  
22 this information to the FDA, doctors, and patients, and by failing to issue a product recall.

23 Bard presents contrary evidence and arguments. Doc. 412 at 13. Bard notes that

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24  
25 <sup>5</sup> The Court finds that the four reasons given by the Ninth Circuit for adopting the  
26 preponderance standard for challenges to attorney-client communications apply as well to  
27 work product: (1) the importance of the work product protection has been recognized  
28 since *Hickman v. Taylor*, 329 U.S. 495 (1947); (2) the *prima facie* standard is not  
inconsistent with a preponderance standard; (3) Federal Rule of Evidence 104(a) applies  
to admissibility questions regarding work product and calls for a preponderance standard;  
and (4) the problem of limited access to proof is mitigated by the possibility of *in camera*  
review as well as the substantial need exception to work product protection. See *In re*  
*Napster*, 479 F.3d at 1095-96.

the two deaths, which led to creation of the Crisis Communications Team, were both reported to the FDA. Doc. 319 at 32, 44. In addition, the adverse outcome rates set forth in the Report were based on adverse events in the MAUDE database, which is maintained by the FDA. Doc. 335 at 14. Bard thus asserts that FDA was fully aware of the deaths and adverse events Plaintiffs rely on for their fraud allegations. Bard also cites evidence of additional adverse-event-rate disclosures to the FDA in October 2004. Doc. 412 at 13. Bard further cites evidence that migration rates for the Recovery Filter were well below rates reported in medical literature for all IVC filters (Doc. 412 at 12), and that the overall adverse event rates for the Recovery Filter were small (*id.*). Finally, Bard notes that the FDA, which is aware of Recovery Filter adverse event rates, has never suggested that the Recovery Filter be recalled. *Id.* at 13.

Given the parties' conflicting evidence and allegations, the Court cannot find by a preponderance of the evidence that Bard engaged in fraudulent or criminal conduct. Plaintiffs have failed to carry their burden of proving the crime-fraud exception.

#### **IV. Additional discovery or evidentiary hearing.**

If the Court is inclined to reject their arguments, Plaintiffs ask for additional discovery and an evidentiary hearing. The Court declines this request for two reasons.

First, this issue has already been litigated in many state and federal courts that preceded this MDL. Thirteen court decisions have found the Report to be protected work product.<sup>6</sup> Four have found the Report subject to discovery.<sup>7</sup> The Court does not find

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<sup>6</sup> *Alexander v. Bard*, No. 3:12-CV-05187-O-BK (N.D. Tex.); *Barkley v. Bard*, No. CV2011-021250 (Ariz. Super. Ct.); *Carr v. Bard*, 297 F.R.D. 328 (N.D. Ohio 2014); *Cason v. Bard*, No. 1:12-CV-01288-MHS (N.D. Ga.); *Ebert v. Bard*, No. 5:12-CV-01253-LS, 2014 WL 1632155 (E.D. Pa. Apr. 24, 2014); *Jones v. Bard*, No. 3:13-CV-00599-K (N.D. Tex.); *Kilver v. Bard*, No. 1:13-CV-01219-MMM-JEH (C.D. Ill.); *Leus v. Bard*, No. 13-CV-00585-W-GAF (W.D. Mo.); *Peterson v. Bard*, No. 3:13-CV-00528-JJR-RLB (M.D. La.); *Phillips v. Bard*, 290 F.R.D. 615 (D. Nev. 2013) (Cobb, M.J.); *Rackliff v. Bard*, No. CV2011-021206 (Ariz. Super. Ct.); *Stesney v. Bard*, No. CV2012-006103 (Ariz. Super. Ct.); *Towlson v. Bard*, No. CV2011-022334 (Ariz. Super Ct.).

<sup>7</sup> *Giordano v. Bard*, No. 37-2011-00069363-CU-PO-EC (Cal. Super. Ct.); *Payne v. Bard*, No. 6:11-CV-01582-ORL-37GJK (M.D. Fla.); *Phillips v. Bard*, No. 3:12-CV-00344-RCJ-WGC (D. Nev.) (Jones, J.); *Tillman v. Bard*, No. 3:13-CV-00222-J-34JBT (M.D. Fla.).



1 these four decisions persuasive. In one, *Giordano v. Bard*, the California Superior Court  
2 denied Bard's attempt to clawback the inadvertently produced Report without providing  
3 any comment or analysis. Doc. 306 at 4-5 n.2. In two others – *Tillman v. Bard* and  
4 *Payne v. Bard* – Magistrate Judge Toomey of the Middle District of Florida applied the  
5 more rigorous “primary purpose” work product standard, which protects “documents  
6 prepared principally or exclusively to assist in anticipated or ongoing litigation.” See  
7 Doc. 443-1 at 110-132. The fourth case, *Phillips v. Bard*, actually involved two  
8 conflicting decisions in Nevada Federal District Court. After briefing and a hearing,  
9 Magistrate Judge Cobb held that the Report was protected work product. See Doc. 306-1  
10 at 120-24, 133, 139-141. During trial, the plaintiff in *Phillips* sought to place the Report  
11 in evidence, Bard objected, and District Judge Jones – without the benefit of briefing –  
12 overruled the objection. *Id.* at 152-54. Thus, the four decisions which found the Report  
13 discoverable either were made without explanation, applied a different legal standard  
14 than the Ninth Circuit's “because of” test, or were made without briefing.

15 Moreover, the fact that the Report has been litigated more than 15 times in a wide  
16 range of courts shows that it has been the subject to ample discovery and argument. And  
17 as noted above, it was the subject of an evidentiary hearing in *Alexander v. Bard*, in the  
18 Northern District of Texas. The plaintiff's lawyers in that hearing are members of the  
19 Plaintiffs' Steering Committee in this MDL. See Doc. 319-2 at 7. Bard was represented  
20 by the same lawyers who are representing it in this MDL. See *id.* at 8.

21 Given this prior litigation history, the Court cannot conclude that Plaintiffs have  
22 been disadvantaged in any way by a lack of discovery or opportunity to develop their  
23 arguments. See Fed. R. Civ. P. 26(b)(2)(C)(ii).

24 Second, the evidence the Court has considered in making this decision does not  
25 suggest that an evidentiary hearing is needed. The testimony of Passero and Lehmann is  
26 consistent with the documentary evidence. Plaintiffs have presented no evidence that  
27 causes the Court to think this is a difficult evidentiary issue requiring in-person  
28 credibility determinations. In short, this is not a close question. The Court therefore will

1 deny Plaintiffs' request for additional discovery and an evidentiary hearing. There are  
2 more relevant and productive tasks to be completed in this MDL.

3 **V. Effect of this ruling on prior rulings in other cases.**

4 The parties agree that this Court's ruling should not affect any prior rulings on this  
5 issue in other cases. *See* Docs. 306 at 21-23; 379 at 29-30. The Court agrees. This  
6 ruling shall operate prospectively only, and shall apply in all MDL cases where the issue  
7 has not previously been decided.

8 **VI. Conclusion.**

9 The Court finds that Bard will suffer specific prejudice or harm if Plaintiffs are  
10 permitted to use a Report entitled to work product protection in discovery or at trial.  
11 Bard has shown good cause for a protective order. *San Jose Mercury News*, 187 F.3d at  
12 1103; *Phillips*, 307 F.3d at 1210-11.

13 **IT IS ORDERED:**

14 1. Defendants' motion for a protective order (Doc. 306) is **granted**. Dr. John  
15 Lehmann's December 15, 2004, report is protected work product pursuant to Federal  
16 Rule of Civil Procedure 26(b)(3). Plaintiffs may not use or rely on the report in any  
17 pending or future case in this MDL. This order shall not affect any transferor courts'  
18 previous orders regarding the discoverability or use of Dr. Lehmann's report.

19 2. Defendants' unopposed motion to seal (Doc. 413) is **granted**. The Clerk is  
20 directed to accept for filing under seal the document lodged on the Court's docket as  
21 Doc. 414.

22 Dated this 11th day of February, 2016.

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David G. Campbell  
United States District Judge



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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 **IN RE: BARD IVC FILTERS**  
10 **PRODUCTS LIABILITY LITIGATION**

MDL No. 15-2641 PHX DGC

11 **This Order Relates to: All Actions**  
12

13 This dispute concerns documents withheld from discovery under the attorney-  
14 client privilege and the work-product doctrine by Defendants C.R. Bard, Inc. and Bard  
15 Peripheral Vascular, Inc. (“Bard”). Plaintiffs challenge a substantial number of  
16 documents on Bard’s privilege log. Plaintiffs sampled 307 documents on the log, which  
17 represents five percent of the total. After meeting and conferring, the parties reached  
18 agreement on all but 133 of the sampled documents. The resolution of this discovery  
19 dispute will be used to guide the parties as they attempt to resolve the overall privilege  
20 dispute in this multi-district litigation (“MDL”).

21 On March 25, 2016, Plaintiffs moved to compel production of the 133 disputed  
22 documents. Doc. 1214. On March 31, 2016, the Court held a third case management  
23 conference where the issue was discussed (Doc. 1246), and the Court provided additional  
24 guidance in the ensuing case management order (Doc. 1319 at 5-6). The issues have now  
25 been fully briefed (Docs. 1476, 1590, 1976, 2219, 2222), and the Court heard oral  
26 arguments on June 21, 2016. The Court has also reviewed the representative sample  
27 documents submitted by the parties. For the following reasons, the Court will grant in  
28 part and deny in part Plaintiffs’ motion to compel.

1     **I.     Choice of Law.**

2             The parties agree that the work-product doctrine is governed by federal law, but  
3     disagree on which law should govern the attorney-client privilege. The parties' briefing  
4     suggests four possibilities: (1) generally applicable common law, (2) Arizona law,  
5     (3) New Jersey law, or (4) the law of each transferor district.

6             **A.     Choice of Law Approaches.**

7             Federal Rule of Evidence 501 provides that "in a civil case, state law governs  
8     privilege regarding a claim or defense for which state law supplies the rule of decision."  
9     Fed. R. Evid. 501. "Rule 501, however, does not tell us which state law the forum state  
10    should apply." *KL Grp. v. Case, Kay & Lynch*, 829 F.2d 909, 918 (9th Cir. 1987).  
11    Commentators have suggested several methods of resolving this choice-of-law issue:  
12    (1) use the privilege law of the state whose substantive law provides the rule of decision;  
13    (2) apply the privilege law of the state in which the federal court sits; or (3) apply the  
14    conflict-of-law doctrine of the state in which the federal court sits. *Id.* (citing 23 C.  
15    Wright & K. Graham, Jr., *Federal Practice and Procedure* § 5435, at 865-69 (1980); 2  
16    Weinstein's *Federal Evidence* § 501[02] (1986)).

17            The issue is complicated in the MDL context, where cases originate in many  
18    different states. In *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and*  
19    *Products Liability Litigation*, MDL No. 2100, 2011 WL 1375011, at \*1 (S.D. Ill. Apr.  
20    12, 2011), the court addressed a privilege challenge to 330 documents, a representative  
21    sample of the 12,857 documents withheld as privileged. Consistent with Rule 501, the  
22    Court found that "privilege matters that are relevant to an element of a claim or defense  
23    for which state law supplies the rule of decision will be governed by state privilege law."  
24    *Id.* at \*7. The court recognized that "a federal court sitting in diversity applies the choice  
25    of law rules emanating from the state in which it sits," and that, in the MDL context, "the  
26    transferee court applies the choice of law rules of the state in which the transferor court  
27    sits." *Id.* at \*4. After surveying the choice of law principles of every state, the court  
28    decided to apply the "most significant relationship" test found in Restatement (Second) of

1 Conflict of Laws § 139 (Am. Law Inst. 1971). The court found that in most states, “the  
2 law of the state with the most significant relationship to the communication will govern  
3 the existence and scope of attorney-client privilege.” *Id.* at \*9.<sup>1</sup>

4 Other cases have adopted different approaches. *See In re Vioxx Prods. Liab.*  
5 *Litig.*, MDL No. 1657, 501 F. Supp. 2d 789, 791-92 (E.D. La. 2007) (applying generally-  
6 known principles of the attorney-client privilege); *In re Baycol Prods. Litig.*, MDL No.  
7 1431, 2003 WL 22023449, at \*1-2 (D. Minn. Mar. 21, 2003) (applying the choice-of-law  
8 rules of the state where the transferee court sits); *U.S. Surety Co. v. Stevens Family Ltd.*,  
9 No. 11-C-7480, 2014 WL 902893, at \*1 (N.D. Ill. Mar. 7, 2014) (applying the privilege  
10 law of state that supplies the substantive rule of decision).

11 After considering these various approaches, the Court agrees with *Yasmin*, which  
12 looked to the transferor states’ choice of law rules to determine which privilege law to  
13 apply. This approach comports with the Supreme Court’s instruction that federal courts  
14 should look to state conflict laws as well as substantive laws. *See Klaxon Co. v. Stentor*  
15 *Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496-97 (1941). The Court also agrees with *Yasmin*’s  
16 selection of the Restatement’s most significant relationship test as best representative of  
17 the choice of law rules applied by the various states. 2011 WL 1375011, at \*7. The  
18 parties also agree. Docs. 1476 at 6; 1590 at 2. Thus, the Court will use Restatement  
19 § 139 to identify the privilege law to be applied in this case.

## 20 **B. Section 139 Analysis.**

21 Part 1 of § 139 provides: “Evidence that is not privileged under the local law of  
22 the state which has the most significant relationship with the communication will be  
23 admitted, even though it would be privileged under the local law of the forum, unless the  
24 admission of such evidence would be contrary to the strong public policy of the forum.”

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25  
26 <sup>1</sup> The court also concluded that cases filed directly in the MDL pursuant to its  
27 direct-filing order should be treated “as if they were transferred from a judicial district  
28 sitting in the state where the case originated.” 2011 WL 1375011, at \*5-6. This  
approach comports with the fourth case management order in this MDL. *See* Doc. 1485  
at 3-4. Thus, directly-filed cases in this MDL will be treated as if they were transferred  
from the forum where the case otherwise would have been filed – typically, the state  
where the plaintiff resides or where the Bard filter was implanted.

1 Restatement (Second) of Conflict of Laws § 139 (Am. Law Inst. 1971). Part 2 provides:  
2 “Evidence that is privileged under the local law of the state which has the most  
3 significant relationship with the communication but which is not privileged under the  
4 local law of the forum will be admitted unless there is some special reason why the forum  
5 policy favoring admission should not be given effect.” *Id.* Thus, § 139 applies only  
6 when the privilege law of the forum differs from that of the state with the most significant  
7 relationship to the allegedly privileged communication.

8 To determine which state has the most significant relationship, Comment e to  
9 § 139 provides this guidance:

10 The state which has the most significant relationship with a communication  
11 will usually be the state where the communication took place, which, as  
12 used in the rule of this Section, is the state where an oral interchange  
13 between persons occurred, where a written statement was received or where  
14 an inspection was made of a person or thing. . . . The state where the  
15 communication took place will be the state of most significant relationship  
16 in situations where there was no prior relationship between the parties to  
17 the communication. If there was such a prior relationship between the  
18 parties, the state of most significant relationship will be that where the  
19 relationship was centered unless the state where the communication took  
20 place has substantial contacts with the parties and the transaction.

21 *Id.*

22 In the case of written communications (the only kind of communication at issue in  
23 this order), the comment suggests that the state where the communication was “received”  
24 has the most significant relationship. This suggestion, made by the ALI in 1971, is  
25 problematic in a day of electronic communications. Email communications – which  
26 represent most of the communication at issue in this motion – usually go back and forth  
27 between the communicating parties several times in a single email string, resulting in  
28 virtually everyone being the “receiving” party for at least some of the communications.  
Email communications can also be “received” by many people in many states  
simultaneously. Thus, it may be impossible to determine which party “received” the  
communication. Commentators have noted this difficulty with the Comment e approach.

1 See Graham C. Lilly & Molly Bishop Shadel, *When Privilege Fails: Interstate Litigation*  
2 *and the Erosion of Privilege Law*, 66 Ark. L. Rev. 613, 643 (2013) (“determining the  
3 state with the ‘most significant relationship’ may prove problematic with electronic  
4 communication”).

5 This case provides an apt example. The first communication at issue in this  
6 motion (Log 2, Control 809) is just over one page long, and yet it includes an initial email  
7 between two people on July 15, 2005; a response copied to three more people on July 17,  
8 2005; a forwarding of the email to still another person on July 18, 2005; and a response  
9 from the recipient of the forwarded email that is addressed to five new individuals and  
10 copied to one new individual, in addition to those already in the email chain. Three  
11 communications, among a total of 12 people, over the course of four days render it  
12 virtually impossible to determine where this communication was “received.” To make  
13 matters more difficult, the parties have not provided the Court with the roles and  
14 locations of many of the people on this email, and this is just one of dozens the Court  
15 must review. Many of the documents at issue in this motion include the same kind of  
16 back-and-forth among many persons over the course of several days.

17 The Court concludes that it would make little sense to find that the state with the  
18 most significant relationship – and therefore the applicable privilege law – varies from  
19 email to email, or maybe even within a single email string, depending on whom happens  
20 to be copied and whom the Court deems to be the primary recipient. The Court finds that  
21 the “received” test for written email communication is simply not workable in this case.<sup>2</sup>

22 The Court need not dwell longer on this issue, however, because the other part of  
23 Comment e suggests that if the parties to the communication in question had a prior  
24 relationship, then the state where that relationship was “centered” will usually be the state  
25 with the most significant relationship. This approach provides a workable solution for  
26 this case. The communications in question appear primarily to be among Bard in-house

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27  
28 <sup>2</sup> The Court notes that Comment e says the place where the written communication  
is received will “usually” be the state with the most significant relationship, leaving room  
for other approaches.

1 lawyers, based at C.R. Bard headquarters in New Jersey, and managers and employees of  
2 Bard Peripheral Vascular (“BPV”), located in Arizona. The subject of this litigation is  
3 the design and performance of filters made and sold by BPV, as well as the marketing  
4 and compliance efforts of BPV. Thus, although lawyers and paralegals for Bard may be  
5 based in New Jersey, it appears their client for purposes of these communications, as well  
6 as the subject of their communications, is primarily BPV and its activities in Arizona.

7 This appearance is confirmed by the evidence. BPV is a wholly-owned subsidiary  
8 of C.R. Bard. Doc. 2219-1 at 2, ¶ 3. BPV is headquartered in Arizona, *id.*, and “is the  
9 company that was and is primarily responsible for all activities related to” the filters at  
10 issue in this case, *id.*, ¶ 4.

11 From its headquarters in Tempe, Arizona, [BPV] had and continues to have  
12 principal responsibility in designing the filters, testing the filters, directing  
13 the manufacturing of the filters, developing contents of the instructions for  
14 use that accompanies the filters, communicating with the FDA regarding  
15 the filters, developing marketing material for the filters, training the sales  
16 force regarding interacting with physicians about [the] filters, developing  
17 written communications to physicians related to the filters, developing and  
maintaining a quality and post-market surveillance system regarding the  
filters, and deciding when each new generation of filter is first marketed  
and the previous filter stops being marketed.

18 *Id.*, ¶ 5. BPV is responsible for managing its own day-to-day operations. Doc. 2219-2 at  
19 3-4. C.R. Bard is responsible for setting “corporate quality standards or guidance[] that  
20 the divisions would need to follow at a global level,” *id.* at 4, but the divisions act as  
21 “their own business that reports back up to Bard corporate or C.R. Bard,” *id.* at 5. C.R.  
22 Bard’s legal department acts as “a full functioning legal department” covering “[a]ll  
23 matters of legal breadth,” and the legal work for BPV. *Id.* at 6.

24 Given these facts, and the reality that lawyers advise clients on the clients’  
25 activities and issues, not the lawyers’ activities and issue, the Court concludes both that  
26 there was a preexisting relationship between the Bard in-house lawyers and BPV, and  
27 that the relationship can most accurately be described as “centered” in Arizona. That is  
28 where products are developed, marketing materials are written, FDA communications

originate, training occurs, testing is done, and legal advice is needed, received, and acted upon.

The authors of the law review article cited above reach a similar conclusion. They note that “[s]ince privileges primarily benefit their holders – such as a client or patient – identifying the holder should be an important indication of which state has the most significant relationship to the communication.” Lilly & Shadel, 66 Ark. L. Rev. at 649. The privilege holder’s “affiliation with competing states is of paramount importance” and “should be a primary factor in determining which state has the most significant relationship to a communication.” *Id.*

The Court concludes that the preexisting relationship between the parties to the communications at issue in this case was centered in Arizona, and that Arizona therefore has the most significant relationship to the communications.<sup>3</sup> As a result, the Court will apply the privilege law of Arizona. Because Arizona also is the forum where this Court is located, the Court need not further apply the conflict resolution principles set forth in parts 1 and 2 of § 139.<sup>4</sup>

### **C. Plaintiffs’ Arguments.**

Plaintiffs argue that New Jersey is the state with the most significant relationship to the communications, but the evidence does not support this conclusion. It is true that C.R. Bard’s corporate center, including its legal department, is located in New Jersey.

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<sup>3</sup> Comment e says the state of the preexisting relationship controls “unless the state where the communication took place has substantial contacts with the parties and the transaction.” Restatement § 139, cmt. e. Because the state where the communication took place is so difficult to identify given the nature of the electronic communications at issue, the Court does not view this part of the comment as helpful or controlling.

<sup>4</sup> The Court notes that if the Court adopted Plaintiffs’ argument that New Jersey has the most significant relationship, and if New Jersey privilege law provided that a particular communication was not privileged, the Court likely would nonetheless apply Arizona law if it would hold the communication privileged. Section 139(1) provides that the forum’s law governs if admission of the evidence in question would be contrary to the strong public policy of the forum. The Court views A.R.S. § 12-2234 – the Arizona statute that governs the corporate attorney-client privilege – as a strong public policy. The statute was passed by the Arizona Legislature and signed by the Governor in response to an Arizona Supreme Court decision that weakened the corporate privilege, and has remained unchanged for more than 20 years. *See Roman Catholic Diocese of Phx. v. Super. Ct.*, 62 P.3d 970, 974 (Ariz. Ct. App. 2003).



1 But the evidence shows that C.R. Bard was not involved in the management of day-to-  
2 day operations of BPV and, as discussed above, virtually all of the relevant conduct and  
3 events occurred at BPV. The fact that Bard's legal department is located in New Jersey  
4 is not dispositive, particularly when the relevant client, BPV, is located in Arizona.

5 Plaintiffs argue that "in the intra-corporate context, the parent and wholly-owned  
6 subsidiary should be treated as one entity." Doc. 2222 at 4. Plaintiff cite *Teleglobe*  
7 *Communications Corp. v. BCE Inc.*, 493 F.3d 345 (3d Cir. 2007), but that case addressed  
8 the effect of disclosing an otherwise privileged attorney-parent communication to the  
9 parent's subsidiary, *see id.* at 369-74. It did not address the complicated choice-of-law  
10 issue presented in this case.

11 Plaintiffs argue that "it is reasonable to presume that Bard's lawyers relied on New  
12 Jersey law" when advising BPV. Doc. 2222 at 4-5. The Court does not agree. Plaintiffs'  
13 own cases suggest that lawyers typically apply the laws of their client's state when  
14 providing guidance. *See, e.g., Compuware Corp. v. Moody's Investors Servs., Inc.*, 222  
15 F.R.D. 124, 133 (E.D. Mich. 2004) (holding that New York company's lawyers advising  
16 on privilege "surely relied on the protections of New York law").

17 Plaintiffs assert that Bard's litigation counsel never mentioned Arizona law in the  
18 parties' meet and confer process, involving "claims going back several years" in related  
19 cases. Doc. 2222 at 5. While this may support an estoppel argument, which Plaintiffs  
20 have not made, it does not address the choice of law issue.

21 Plaintiffs assert that Bard "is hardly a major employer in Arizona" and that BPV  
22 "does not specifically market in Arizona, has no retail locations here, and some of its  
23 products including IVC filters are manufactured elsewhere." Doc. 2222 at 5. But  
24 Plaintiffs do not dispute that BPV is an Arizona corporation with its principal place of  
25 business here. The relevant question is not the significance of BPV's presence in  
26 Arizona, but where the relationship between BPV and its lawyers was centered. For  
27 reasons discussed above, the Court concludes that the relationship was centered in  
28 Arizona, the location of the activities for which the legal advice was provided.



## II. Legal Standard.

### A. Attorney-Client Privilege.

The attorney-client privilege “is rigorously guarded to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.” *State v. Sucharew*, 66 P.3d 59, 64, ¶ 10 (Ariz. Ct. App. 2003) (citing *State v. Towery*, 920 P.2d 290, 299 n.6 (Ariz. 1996) (internal quotation marks omitted)). “The privilege belongs to the client and encompasses communication between the attorney and client made in the course of the attorney’s professional employment.” *Id.* (citing *State v. Holsinger*, 601 P.2d 1054, 1058 (Ariz. 1979)). “The burden of showing the relationship, the confidential character of the communication, and other necessary facts, is that of the party claiming the privilege.” *State v. Sands*, 700 P.2d 1369, 1374 (Ariz. Ct. App. 1985) (citation omitted).

In Arizona, the corporate attorney-client privilege is codified at A.R.S. § 12-2234:

- A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney’s paralegal, assistant, secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity.
- B. For purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:
  1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
  2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.
- C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

1 “Based on its express terms, the statute protects from disclosure communications between  
 2 a corporation’s attorney – or his ‘paralegal, assistant, secretary, stenographer or clerk’ –  
 3 and ‘any employee, agent or member of the entity or employer regarding acts or  
 4 omissions of or information obtained from the employee agent or member’” if it is “[f]or  
 5 the purpose of obtaining information in order to provide legal advice to the entity or  
 6 employer or to the employee, agent or member.” *Salvation Army v. Bryson*, 273 P.3d  
 7 656, 662-63 (Ariz. Ct. App. 2012) (citations omitted).

### 8 **B. Work-Product Doctrine.**

9 “Ordinarily, a party may not discover documents and tangible things that are  
 10 prepared in anticipation of litigation or for trial by or for another party or its  
 11 representative (including the other party’s attorney, consultant, surety, indemnitor,  
 12 insurer, or agent).” Fed. R. Civ. P. 26(b)(3)(A). Courts in the Ninth Circuit use the  
 13 “because of” test to determine whether dual-purpose documents were prepared in  
 14 anticipation of litigation:

15 In circumstances where a document serves a dual purpose, that is, where it  
 16 was not prepared exclusively for litigation, then the “because of” test is  
 17 used. Dual purpose documents are deemed prepared because of litigation if  
 18 in light of the nature of the document and the factual situation in the  
 19 particular case, the document can be fairly said to have been prepared or  
 20 obtained because of the prospect of litigation. In applying the “because of”  
 21 standard, courts must consider the totality of the circumstances and  
 determine whether the document was created because of anticipated  
 litigation, and would not have been created in substantially similar form but  
 for the prospect of litigation.

22 *United States v. Richey*, 632 F.3d 559, 567-68 (9th Cir. 2011) (quotation marks and  
 23 citations omitted). The party invoking work-product protection bears the burden of  
 24 proof. *Conoco Inc. v. U.S. Dep’t of Justice*, 687 F.2d 724, 728 (9th Cir. 1982).

### 25 **III. Application.**

26 The parties have identified several categories of documents that are in dispute, and  
 27 have submitted for *in camera* review a binder of sample documents selected by the  
 28 parties (*see* Doc. 1319) and a matrix addressing the samples. The categories have been

identified by Plaintiffs, and are described in a letter dated April 4, 2016, from Plaintiffs' counsel to Bard's counsel. *See* Doc. 1476-3. This order will follow the category numbering from the letter.

**A. Category 1a.**

Plaintiffs' first category involves communications "where Defendants have failed to establish [that] the communication evidences a request made to or from a lawyer for the purpose of obtaining or providing legal advice of the lawyer," specifically, "[e]ntries where non-attorney employees are alleged to have given legal advice independent of a lawyer." Doc. 1476-3 at 2. Plaintiffs make three general arguments: (1) there is no lawyer involved in the communications; (2) Bard has failed to provide facts suggesting how the matter being discussed is of legal importance; and (3) any privilege that may have attached was waived by the presence of a third party.

Arizona's corporate attorney-client privilege protects a communication by an attorney's "paralegal, assistant, secretary, stenographer or clerk" if it would otherwise be privileged. A.R.S. § 12-2234(A), (B); *see also Salvation Army*, 273 P.3d at 662-63. To be protected, a communication must be made for the purpose of providing legal advice or obtaining information to provide legal advice. A.R.S. § 12-2234(B)(1), (2). The fact that a communication includes a party's agent does not destroy the privilege. A.R.S. § 12-2234(B); *Salvation Army*, 273 P.3d at 662-63.

Bard provided an affidavit from Candace Camarata, who serves as Bard's assistant general counsel for litigation.<sup>5</sup> The affidavit establishes the following. Bard's Law Department routinely provides BPV's employees with legal advice, including advice about ongoing litigation. Doc. 1476-9 at 2, ¶¶ 2-3. Bard's lawyers often utilize paralegals, referred to as either a "Litigation Manager" or a "Trademark Manager," to facilitate these communications. *Id.*, ¶ 3. Due to Bard's size, these messages must often

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<sup>5</sup> Plaintiffs object to the Court's reliance on Ms. Camarata's affidavit because she lacks personal knowledge of any communications to which she was not a party. The Court views Ms. Camarata's affidavit as attesting to procedures of Bard's Law Department in general, such as the general types of legal advice given and how paralegals are utilized by in-house counsel. Ms. Camarata has personal knowledge of these facts.

1 be forwarded to others within the company who need the information to perform their  
2 jobs. *Id.* at 3. ¶ 7.

3 The parties have provided the Court with five Category 1a documents. Each  
4 communication involves at least one Bard paralegal.

5 The first disputed Category 1a communication – Log 2, Control 809 – is an email  
6 string containing four separate messages. In the first message, an employee emails a  
7 litigation paralegal about a pending case. The paralegal responds, while adding  
8 additional legal personnel, including another paralegal and an in-house lawyer. The  
9 paralegal asks the initial author of the email to forward her message to other individuals  
10 in the author’s department. The message is then forwarded twice, and a consultant is  
11 copied on the final message. The consultant, Richard Bliss, is a former Bard employee  
12 who worked full time at BPV in Arizona under a consulting contract, serving as Head of  
13 Quality and Regulatory while Bard searched for a permanent employee to fill that  
14 position. Doc. 1476-8 at 3, ¶ 5. The Court concludes that Bliss constituted an agent  
15 within the meaning of § 12-2234(B). Because this email string consists of  
16 communications between Bard employees or agents and a paralegal, concerning ongoing  
17 litigation, the Court concludes that it falls within the protection of A.R.S. § 12-2234.  
18 *Salvation Army*, 273 P.3d at 662-63 (“the statute protects from disclosure  
19 communications between a corporation’s attorney – or his paralegal, assistant, secretary,  
20 stenographer or clerk – and any employee, agent or member of the entity or employer . . .  
21 [f]or the purpose of obtaining information in order to provide legal advice to the entity or  
22 employer or to the employee, agent or member.”) (quotation marks omitted).

23 Log 6, Control 8 consists of two cells from a larger spreadsheet apparently  
24 tracking specific complaints regarding Bard filters. The cells include a “comments”  
25 section in which various employees make dated entries regarding facts or events related  
26 to the complaint. Bard redacted two entries that reflect communications from paralegals  
27 regarding litigation and investigation of a complaint. Because the redacted portions  
28 contain internal communications from Bard’s legal personnel, the Court concludes that

1 they are protected by Arizona's attorney-client privilege.

2 Upon review of the other Category 1a documents – Log 6, Control 193; Log 3,  
3 Control 3184; and Log 3, Control 2244 – the Court concludes that they are privileged  
4 under the Arizona statute. They reflect communications to or from Bard paralegals  
5 seeking information needed for legal advice. The Court therefore denies Plaintiffs'  
6 motion to compel production of documents in Category 1a.

7 **B. Category 1b.**

8 Plaintiffs' second category involves communications "where Defendants have  
9 failed to establish the communication evidences a request made to or from a lawyer for  
10 the purpose of obtaining or providing legal advice of the lawyer," including "[e]ntries  
11 where both the author and recipient are non-lawyers and Defendants" failed to provide  
12 key information, such as the lawyer asked to provide legal advice, the legal purpose for  
13 which the lawyer was consulted, or why disclosure to a non-lawyer was necessary to  
14 fulfill that purpose. Doc. 1476-3 at 2.

15 Plaintiffs challenge the Category 1b documents on many of the same grounds as  
16 the Category 1a documents. These communications all generally involve a paralegal, as  
17 in Category 1a. The Court concludes that two communications – Log 3, Control 2295,  
18 and Log 4, Control 29 – are privileged for the reasons discussed above in Category 1a.  
19 They reflect communications to or from Bard paralegals seeking information needed for  
20 legal advice. *See Salvation Army*, 273 P.3d at 662-63.

21 Defendants produced the email at Log 3, Control 3028, but not the attached  
22 memorandum. The Court rejects Plaintiffs' argument that the privilege does not apply  
23 because the memorandum would not "be deemed a traditionally legal document." The  
24 memorandum is addressed to two Bard lawyers, and two others at BPV, and reports on  
25 reviews of literature, data bases, and other sources to obtain information regarding risks  
26 and complications of particular filters. It also includes a list of known risks. The  
27 information contained in the memorandum clearly is of a type that lawyers would  
28 consider in advising the company on legal risks, and the Court finds that the

1 memorandum is covered by Arizona's attorney-client privilege. A.R.S. § 12-2234(B).

2 Log 6, Control 191 is a communication between an ESI vendor and Bard  
3 employees regarding ESI searches to be done on behalf of Bard's outside counsel in this  
4 case, for witnesses that have been mentioned in motions in this case. It is a document  
5 prepared in connection with ongoing litigation, and is protected work product. Fed. R.  
6 Civ. P. 26(b)(3)(A). As the Court has noted in a previous order, the fact that a document  
7 is prepared by non-lawyers and does not include legal advice does not mean that it was  
8 not prepared in anticipation of litigation for purposes of Rule 26(b)(3)(A). Doc. 699 at 8.

9 Log 3, Control 57 contains redactions in an email chain. The Court has reviewed  
10 the redacted communications. They include a request for legal advice from an in-house  
11 attorney and the attorney's response, and are privileged.

12 The Court denies Plaintiffs' motion to compel as it pertains to Category 1b.

13 **C. Category 2.**

14 This category involves communications that do not show "that any legal advice  
15 was given or requested. In other words, where Defendants have failed to establish that a  
16 lawyer was being asked to act as a lawyer – giving advice with respect to the legal  
17 implications of a proposed course of conduct." Doc. 1476-3 at 2.

18 With respect to Log 2, Control 403, the redacted portion of the email was from  
19 Donna Passero, one of Bard's in-house lawyers. The redacted email language, and the  
20 attachment that was withheld, include communications to and from Ms. Passero  
21 regarding directions given to Bard sales representatives on statements they could or could  
22 not make in their sales activities. Such communications have important legal implication  
23 for Bard, and the communication is privileged.

24 Log 3, Control 1697 is a redacted email to Tom Conniff, one of Bard's in house  
25 lawyers. It concerns terms of an agreement being drafted, and is privileged.

26 With respect to Log 6, Control 65, Bard states that it has previously produced the  
27 cover email but not the attachment. The attachment is a spreadsheet titled "Trade  
28 Complaints Tracker." It contains a number of rows and columns, including a column

1 titled “Status Summary: (Briefly Describe).” This column sometimes includes questions  
 2 from specific Bard personnel, as denoted by their initials, to other individuals, also  
 3 denoted by their initials. Some of the communications in this column are to or from in-  
 4 house attorney Gina Dunsmuir. Bard’s arguments with respect to this document do not  
 5 attempt to show that entire spreadsheet is privileged or created for a privileged purpose.  
 6 The portions that reflect internal communications to or from counsel appear to be  
 7 privileged, but not other portions that reflect facts such as event dates, identities of  
 8 competitors, and event summaries. Nor does the Court find that descriptions of counsel’s  
 9 communications with persons outside of Bard are privileged (such as event 3d, column  
 10 titled “Event Summary”). If Bard has withheld the entire spreadsheet, it should produce a  
 11 redacted version that redacts only those portions reflecting privileged communications.<sup>6</sup>

12 Log 3, Control 1694 is an email from outside counsel attaching a draft letter to  
 13 opposing counsel relating to contract negotiations. The email requests feedback on the  
 14 letter, and a response provides feedback. The communications are privileged.

15 Log 2, Control 741 is a communication between BPV personnel and at least two  
 16 Bard lawyers, Gary Mitchell and Gina Dunsmuir. These communications involve legal  
 17 advice or the obtaining of information in order to provide legal advice. They are  
 18 privileged.

19 The Court concludes that the four communications in Category 2 are protected by  
 20 the attorney-client privilege. The fifth document – Log 6, Control 65 – is only protected  
 21 to the extent it contains communications covered by the privilege, but not otherwise, and  
 22 unprivileged portions should be produced. The Court therefore grants in part and denies  
 23 in part Plaintiffs’ motion to compel as it pertains to Category 2.

#### 24 **D. Category 3.**

25 Category 3 involves “[e]ntries where a business purpose would have provided a  
 26 sufficient cause for the communications.” Doc. 1476-3 at 2. For the attorney-client  
 27 privilege to attach, the communication must have been for the purpose of providing legal

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28 <sup>6</sup> Bard did not invoke the work-product doctrine as to this document.



1 advice or for obtaining information in order to provide legal advice. A.R.S. § 12-  
2 2234(B).

3 The Court already concluded that Log 2, Control 403 is privileged. Three of the  
4 remaining four communications also are clearly privileged. Log 3, Control 334 is a  
5 communication redacted to remove advice received from Bard's legal department. Log  
6 2, Control 794 communicates legal advice of Donna Passero, one of Bard's in-house  
7 lawyers. Log 5, Control 203 conveys information to Ms. Passero, a lawyer, from Dr.  
8 Richard Lehmann, Bard's consultant retained by the legal department, regarding a patient  
9 death. Each of these communications involves either the relaying of legal advice or the  
10 providing of information to in-house attorneys in connection with risks faced by the  
11 company. A.R.S. § 12-2234(B). The attorney-client privilege applies.

12 The fifth document, Log 1, Control 115, is a communication from Dr. Lehmann, a  
13 consultant retained by Bard's legal department. The Court has previously found that the  
14 legal department retained Dr. Lehmann in 2004 in anticipation of litigation after Bard  
15 received notice of adverse events associated with the Recovery Filter. Doc. 699 at 5.  
16 The communication concerns analysis performed by Dr. Lehmann in accordance with  
17 Schedule A (Doc. 335 at 9) of his contract with the legal department, and Dr. Richard  
18 Holcomb, another consultant to the legal department. Because Lehman and Holcomb  
19 were agents of Bard in performing this work, and the result was communicated to Bard  
20 attorney Donna Passero, among other Bard personnel, the Court concludes that it is  
21 privileged under the Arizona statute: "any communication is privileged between an  
22 attorney for [an] . . . entity . . . and any . . . agent . . . of the entity . . . [f]or the purpose of  
23 obtaining information in order to provide legal advice to the entity." A.R.S. § 12-  
24 2234(B)(2).

25 The Court also finds this document protected by the work-product doctrine. As  
26 noted, the Court previously held that Dr. Lehmann was retained in anticipation of  
27 litigation. Doc. 699. Plaintiffs argue that this communication also had a business  
28 purpose, but a dual purpose document is still protected if it "would not have been created



1 in substantially similar form but for the prospect of litigation.” *Richey*, 632 F.3d at 567-  
2 68. The Court cannot conclude that this work would have been done in substantially the  
3 same form solely for business reasons. Nor is the Court persuaded by Plaintiffs’ citation  
4 to *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 652-53 (D. Nev. 2013). The cited pages of  
5 that case concern a different email that did not include any legal counsel. *Id.*

6 The Court denies Plaintiffs’ motion to compel production of Category 3  
7 documents.

#### 8 **E. Category 4.**

9 This category involves “[e]ntries where in-house counsel was being asked to edit  
10 or comment on non-traditional legal documents (technical, scientific, public relations,  
11 management, and marketing) versus traditional legal instruments (contracts for a study,  
12 retention of experts, patent applications).” Doc. 1476-3 at 2. Arizona courts have not  
13 directly addressed the scope of the corporate attorney-client privilege in the context of  
14 heavily-regulated industries. The Court must therefore “use its own best judgment in  
15 predicting how [the Arizona Supreme Court] would decide the case,” and, in doing so,  
16 “may be aided by looking to well-reasoned decisions from other jurisdictions.”  
17 *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980) (citations  
18 omitted).

19 In the heavily-regulated industry context, “services that initially appear to be non-  
20 legal in nature, like commenting upon and editing television ads and other promotional  
21 materials, could, in fact, be legal advice.” *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. at  
22 800. Some courts use the “primary purpose” standard, which protects communications in  
23 which lawyers provide both legal and business services if “counsel was participating in  
24 the communications primarily for the purpose of rendering legal advice or assistance.”  
25 *Id.* at 798. Other courts employ the “because of” standard, which was developed in the  
26 work-product context. *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 628 (D. Nev. 2013).  
27 Regardless of which standard is employed, the Court must conduct a document-by-  
28 document, fact-specific inquiry. *See S.G.D. Eng’g, Ltd. v. Lockheed Martin Corp.*, No.

1 CV-11-02493-PHX-DGC, 2013 WL 2297175, at \*3 (D. Ariz. May 24, 2013) (adopting  
2 special master's report and recommendation).

3 As an initial matter, Plaintiffs argue that several documents are not privileged  
4 because they would not "be deemed a traditionally legal document." This argument is  
5 not supported by Arizona's corporate attorney-client privilege, which applies broadly to  
6 "any communication." A.R.S. § 12-2234(B).

7 Four of the five communications – Log 2, Control 293; Log 3, Control 1965;  
8 Log 3, Control 423; and Log 4, Control 4 – were made for the primary purpose of  
9 providing legal advice or assistance. Each of these communications involves a Bard  
10 lawyer providing comments. Although the comments arguably serve both a business and  
11 a legal purpose, they appear to be for the primary purpose of providing legal advice.  
12 Log 2, Control 293, for example, involves edits by two Bard lawyers, Donna Passero and  
13 Judith Reinsdorf, to a communication to the sales force. The communication concerns  
14 FDA regulation and adverse events, both of which strongly implicate legal issues, as do  
15 the sales force's public representations concerning such matters. Ms. Reinsdorf  
16 specifically states that "[w]ith these edits, this email can serve as 'legal's approval.'" The  
17 other three documents similarly involve edits of Bard's lawyers on matters implicating  
18 legal issues.

19 Plaintiffs contend that Log 3, Control 1965 cannot be privileged because Bard had  
20 an independent duty to produce the documents under 21 C.F.R. § 820.100 and under  
21 Bard's own policies and procedures. Even if this is true, it does not lead to the  
22 conclusion that Plaintiffs are entitled to communications in which Bard receives legal  
23 advice in the document's preparation.

24 Log 6, Control 54 includes an email chain in which a Bard in-house attorney  
25 provides comments on a letter to a doctor apparently affiliated with the Agency for  
26 Health Care Research and Quality. The redacted portions of the emails are privileged, as  
27 they reflect the attorney's recommendations, and the attorney's suggested edits to the  
28 letter are privileged for the same reason. The Court cannot conclude that the attorney

1 was merely performing a business function. Communications with an agency regarding  
2 studies of Bard products certainly could have legal implications, and review by counsel  
3 of such communications would clearly involve potential legal issues.

4 The Court denies Plaintiffs' motion to compel production of Category 4  
5 documents.

6 **F. Category 5.**

7 Category five involves "[e]ntries where both the author and the recipient are non-  
8 lawyers and an attorney was merely copied on the communication." Doc. 1476-3 at 3.  
9 Arizona's corporate attorney-client privilege law protects communications made for the  
10 purpose of providing legal advice or information in order to provide legal advice. A.R.S.  
11 § 12-2234(B).

12 Four of the five communications – Log 2, Control 859; Log 2, Control 816; Log 3,  
13 Control 3987; and Log 3, Control 3161 – involve communications where a lawyer is  
14 involved primarily for the purpose of rendering legal advice or assistance. The redacted  
15 portions of Log 2, Control 859, for example, explicitly reference revisions from  
16 discussions with outside products liability counsel. Log 2, Control 816 consists of  
17 internal Bard communications about draft materials to be sent to the FDA, with an in-  
18 house lawyer as a party to the communications. As the communications provide  
19 information to a lawyer for the purpose of obtaining legal advice, they fall within A.R.S.  
20 § 12-2234(B)(2). Log 3, Control 3987 is a draft of a communication to a regulator,  
21 copied to a lawyer. Log 3, Control 3161 involves communications between Bard's  
22 lawyers and BPV personnel regarding a research grant request. These communications  
23 are privileged because they involve lawyers in the preparation of documents that have  
24 potential legal significance. Involving lawyers in such communications provides them  
25 with the information needed to provide legal advice on the issues of legal significance.  
26 A.R.S. § 12-2234(B).

27 Log 1, Control 114 is a memo from Dr. Lehmann and Richard Holcomb to Bard's  
28 medical director, copied to Donna Passero. As noted above, the Court has previously

1 found that the legal department retained Dr. Lehmann in anticipation of litigation after  
2 Bard received notice of adverse events associated with the Recovery Filter. Doc. 699 at  
3 5. The communication concerns analysis performed by Dr. Lehmann in accordance with  
4 his contract with the legal department, and Dr. Holcomb, another consultant to the legal  
5 department. Indeed, this document is closely related to Log 1, Control 115, discussed  
6 above, and includes some of the same materials. Because Lehman and Holcomb were  
7 agents of Bard in performing this work, and the result was communicated to Bard  
8 attorney Donna Passero, among other Bard personnel, the Court concludes that it is  
9 privileged under the Arizona statute: “any communication is privileged between an  
10 attorney for [an] . . . entity . . . and any . . . agent . . . of the entity . . . [f]or the purpose of  
11 obtaining information in order to provide legal advice to the entity.” A.R.S. § 12-  
12 2234(B)(2).

13 The Court also finds this document protected by the work-product doctrine. Dr.  
14 Lehmann was retained by the Bard legal department in anticipation of litigation.  
15 Doc. 699. Plaintiffs argue that the communication also had a business purpose, but a dual  
16 purpose document is protected if it “would not have been created in substantially similar  
17 form but for the prospect of litigation.” *Richey*, 632 F.3d at 567-68. The Court cannot  
18 conclude that this work would have been done in substantially the same form solely for  
19 business reasons. Nor is the Court persuaded by Plaintiffs’ citation to *Phillips*, 290  
20 F.R.D. at 652-53. The cited pages concern an email on a different subject that did not  
21 include any legal counsel. *Id.*

22 The Court denies Plaintiffs’ motion to compel production of Category 5  
23 documents.

#### 24 **G. Category 6.**

25 This category involves “[e]ntries describing a communication to non-lawyers and  
26 attorneys seeking simultaneous review and comment.” Doc. 1476-3 at 3. Three of the  
27 five examples do not require the Court’s attention. Plaintiffs have withdrawn their  
28 challenge to Log 3, Control 809, Bard has produced Log 6, Control 251, and the Court

1 determined above that Log 2, Control 816 is privileged.

2 The redacted portions of Log 3, Control 175 are privileged. The redacted portions  
3 appear in an email from Judith Reinsdorf, one of Bard's in-house lawyers, to several Bard  
4 personnel. Ms. Reinsdorf is providing substantive feedback on a plan to assess clinical  
5 issues relating to the G2 filter. Ms. Reinsdorf's comments appear to be for the purpose of  
6 providing legal advice.

7 The redacted portions of Log 3, Control 2099 are privileged. The redacted  
8 portions appear in an email to Gina Dunsmuir, one of Bard's lawyers, and others, and  
9 seek comments on draft talking points to Bard's sales force. Communications with sales  
10 force, as noted above, can have significant legal implications, as illustrated by Plaintiffs'  
11 claim in this case that Bard's sales force made misrepresentations concerning its  
12 products. Because the communication solicits input from a lawyer on these issues, it falls  
13 within A.R.S. § 12-2234(B).

14 The Court denies Plaintiffs' motion to compel production of Category 6  
15 documents.

16 **H. Category 7.**

17 This category involves "[e]ntries that do not describe the author or recipient of the  
18 communication, including attachments." Doc. 1476-3 at 3. Two of the five examples  
19 do not require the Court's attention. The Court found above that Log 2, Control 403 is  
20 privileged, and Bard has produced Log 6, Control 330.

21 Two of the remaining three documents are clearly privileged. Log 3, Control 224  
22 contains legal advice of Bard's in-house and outside counsel. Log 6, Control 115  
23 involves talking points from Bard's in-house counsel with respect to an earnings call that  
24 will address ongoing litigation.

25 The final document, Log 3, Control 3089, is privileged. It involves an email  
26 communication among Bard personnel, including both in-house and outside counsel,  
27 attaching a draft document. In Category 1b, above, the Court concluded that the final  
28 version of the attachment was privileged. The draft attachment is addressed to an in-

1 house Bard lawyer, and others at BPV, and reports on reviews of literature, data bases,  
2 and other sources to obtain information regarding risks and complications of particular  
3 filters. It also includes a list of known risks. The information contained in the  
4 memorandum clearly is of a type that lawyers would consider in advising the company on  
5 legal risks, and the Court finds that the memorandum is covered by the attorney-client  
6 privilege.

7 The Court denies Plaintiffs' motion to compel production of Category 7  
8 documents.

9 **I. Category 8.**

10 This category involves "[e]ntries where a non-party is an author or listed as  
11 receiving a copy of the communication so as to have waived any attorney-client privilege  
12 or work product." Doc. 1476-3 at 3. Arizona's corporate attorney-client privilege covers  
13 "any employee, agent, or member." A.R.S. § 12-2234(B).

14 One of these examples does not require the Court's attention. Bard has already  
15 produced Log 2, Control 1220. Plaintiffs object that they cannot verify this assertion  
16 because Bard has not provided a bates number for the document. Bard is directed  
17 promptly to provide Plaintiffs with the bates number of the unredacted version of Log 2,  
18 Control 1220 it produced.

19 The remaining four documents all appear to be privileged. Log 2, Control 502  
20 involves legal communications made by paralegals similar to the examples discussed in  
21 Category 1a above. The Court concluded that those and similar communications are  
22 privileged. Log 3, Control 335 and Log 3, Control 326 both involve Bard's intellectual  
23 property counsel and a draft patent application. Log 2, Control 336 passes along  
24 information received from Bard's lawyers for litigation purposes. The attorney-client  
25 privilege applies to these documents unless it was waived.

26 The presence of consultants does not waive the privilege. As already noted,  
27 Arizona's corporate privilege covers communications involving a corporation's "agents."  
28 A.R.S. § 12-2234(B). What is more, the Court concludes that the Arizona Supreme

1 Court would likely adopt the “functional equivalent” test adopted by the Ninth Circuit,  
2 which provides that consultants who act as the functional equivalent of an employee are  
3 treated as an employee for purposes of the attorney-client privilege. *See United States v.*  
4 *Graf*, 610 F.3d 1148, 1157-59 (9th Cir. 2010). Bard has provided evidence that both  
5 Richard Bliss and John Kaufmann functioned as employees. *See* Doc. 1476-9 at 3, ¶¶ 5,  
6 7. Under either the plain terms of A.R.S. § 12-2344(B) or the functional equivalent  
7 doctrine, the presence of consultants did not result in waiver of an otherwise privileged  
8 document.

9 The Court denies Plaintiffs’ motion to compel as it pertains to Category 8.

10 **IV. Remaining Issues.**

11 The Court expects that the parties will use this ruling as a guide to resolve  
12 remaining privilege disputes. The parties shall update the Court as to their progress on  
13 privilege issues in their joint submission for the next case management conference. In  
14 that submission, the parties shall address whether they believe it would be helpful to  
15 appoint a special master to resolve any additional privilege disputes.

16 **IT IS ORDERED** that Plaintiffs’ motion to compel (Doc. 1214) is **granted in**  
17 **part** and **denied in part** as set forth above.

18 Dated this 25th day of July, 2016.

19  
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22 \_\_\_\_\_  
23 David G. Campbell  
24 United States District Judge  
25  
26  
27  
28



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U.S. District Court

DISTRICT OF ARIZONA

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### Docket Text:

**ORDER.** The Court has reviewed the parties' briefing on issues in dispute with respect to Discovery Group 1. Docs. 4503, 4505, 4608, 4639. (In the future, responses and replies shall not be filed when the parties have each stated their positions in the initial filings, as here.) The Court concludes that limitations should not be placed on Plaintiffs' ex parte communications with treating physicians. The Court has reviewed cases cited by both sides, and finds that the weight of recent case law disfavors such limitations. See *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2016 WL 915288 (E.D. La. Mar. 9, 2016); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, MDL No. 2545, 2016 WL 929343 (N.D. Ill. Mar. 7, 2016); *In re Benicar (Olmesartan) Prods. Liab. Litig.*, MDL No. 2026, 2016 WL 1370998 (D.N.J. Apr. 6, 2016). Cases imposing such limitations are older than these recent cases and generally lack analysis in support of the limitations they impose. See, e.g., *In re Chantix (Varenicline) Prod. Liab. Litig.*, No. 2:09-CV-2039-IPJ, 2011 WL 9995561 (N.D. Ala. June 30, 2011); *In re OrthoEvra Prod. Liab. Litig.*, No. 1:06-40000, 2010 WL 320064 (N.D. Ohio Jan. 20, 2010); *In re Nuvaring Prod. Liab. Litig.*, No. 4:08MD1964 RWS, 2009 WL 775442 (E.D. Mo. Mar. 20, 2009). The Court finds the more recent decisions persuasive. The Court will adopt the disclosure requirements in the proposed case management order regarding ex parte communications. The Court also notes that it agrees with the Ninth Circuit's position in *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011) ("a treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment"). The parties have not briefed whether *Goodman* should apply in this MDL, but, if it does, the parties will not be permitted to present expert opinions that were not formed in the course of treatment unless those opinions were appropriately disclosed under Rule 26(a)(2). On another issue addressed in the briefing, the Court will not require that Defendants question treating physicians first. For treating physicians who would be called by Plaintiffs during their case in chief, "examination and cross-examination of a deponent proceed as they would at trial." Fed. R. Civ. P. 30(c)(1). The Court will adopt Plaintiffs' proposed order language on depositions of treating physicians. Finally, the Court will permit the deposition of one sales representative per case during Discovery Group 1. The Court concludes that such depositions will provide important information for bellwether selection, but that more than one deposition is not needed before selection. The Court will not impose the time or subject limits proposed by Defendants for the sales representative depositions. Signed by Judge David G Campbell on 2-6-17. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (DGC)

2:15-md-02641-DGC Notice has been electronically mailed to:

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability  
Litigation,

No. MDL 15-02641-PHX DGC

**CASE MANAGEMENT ORDER  
NO. 26**

The Court held a tenth case management conference on July 13, 2017. The conference addressed ongoing matters identified in the parties' joint report. Doc. 6599. The following matters are decided.

**A. Dr. Henry Deposition.**

In order to decide whether Dr. Henry should be re-deposed, the Court must decide whether the objections asserted in his first deposition were appropriate. On or before **July 28, 2017**, the parties shall file memoranda, not to exceed 12 pages, addressing the following issues: (1) Does Federal Rule of Evidence 501 apply to the privilege asserted by Dr. Henry's counsel? (2) If so, what state law supplies the rule of decision within the meaning of Rule 501? (3) Does the applicable state law support the objection and instruction made by Dr. Henry's attorney? (4) Even if the instruction and objection were appropriate in the normal case, does assertion of the learned intermediary defense mean that the objection and instruction should not be permitted?

1           **B.     Proposed Deposition of Dr. Altonaga.**

2           Case Management Order No. 24 addressed fact depositions in bellwether cases:  
3           “These depositions may include Bard present or former employees only if the depositions  
4           will likely produce probative evidence that could not reasonably have been obtained  
5           during general discovery.” Doc. 5883 at 1-2. After considering the parties’ arguments,  
6           the Court concludes that the evidence Plaintiffs now seek to elicit from Dr. Altonaga  
7           could reasonably have been obtained during general discovery. Plaintiffs do not seek  
8           facts unique to any of the bellwether cases, but instead to obtain Bard information that  
9           existed at the time of the design, sale, and use of the various filters at issue in the  
10          bellwether cases. While bellwether cases had not been identified during general  
11          discovery, Plaintiffs clearly understood that most of the cases in this MDL concern the  
12          G2-series or Eclipse filters, and could have deposed Dr. Altonaga during general  
13          discovery regarding facts related to those filters and the years in which they were offered  
14          for sale. As a result, the requirement of CMO 24 is not satisfied and the Court will not  
15          permit Plaintiffs to depose Dr. Altonaga as part of bellwether-case discovery.

16          **C.     Communications Among Plaintiffs’ Experts.**

17          The Court and parties held a discussion regarding the discoverability of  
18          communications between Plaintiffs’ experts, with the Court attempting to provide some  
19          guidance on its interpretation of Rule 26(b)(4). Plaintiffs shall produce communications  
20          among their experts to Defendants. If Plaintiffs conclude that any such communications  
21          are properly withheld, they shall provide Defendants with a privilege log that identifies  
22          the specific basis on which Plaintiffs’ conclude that the communications are protected  
23          under Rule 26(b). If the parties have disagreements after this production has occurred,  
24          they should place a conference call to the Court for a resolution.

25          **D.     Preemption Motion Briefing.**

26          The Court sets the following schedule for completion of briefing on Defendants’  
27          preemption motion for summary judgment:  
28

- Plaintiffs' experts on preemption shall be disclosed by **July 21, 2017**;
- Defense experts on preemption, if sought by Defendants and allowed by the Court after a conference call, shall be disclosed by **August 4, 2017**;
- Preemption experts shall be deposed by **August 18, 2017**;
- Plaintiffs' response to Defendants' motion shall be filed by **September 1, 2017**;
- Defendants' reply shall be filed by **September 22, 2017**.

Defendants' motion to seal exhibits will be briefed on the following schedule:

- Defendants' amended motion to seal shall be filed on or before **July 28, 2017**;
- Plaintiffs' response shall be filed on or before **August 28, 2017**;
- Defendants' reply shall be filed on or before **September 13, 2017**.

**E. Class Certification Hearing.**

The Court will allow 45 minutes per side for oral argument at the class certification hearing on **August 11, 2017**. The Court does not expect this to be an evidentiary hearing.

**F. Next Case Management Conference and Science Day.**

The next case management conference will be held on **October 5, 2017, at 10:00 a.m.** The parties shall file a joint report seven days before the conference.

A science day will also be held on **October 5, 2017**. The Court will set aside two hours per side for science presentations.

**G. Motions to Disqualify Experts.**

Plaintiffs shall respond to the recently filed motion to disqualify Drs. Vogelzang and Desai by **July 28, 2017**. Defendants shall file a reply by **August 4, 2017**. The Court will endeavor to review this motion before the class certification hearing on August 11, 2017.

1           **H.     Bellwether Trial Issues.**

2           The Court and the parties discussed preparation for and scheduling of bellwether  
3 trials. The Court advised the parties that it cannot know whether bellwether trials will be  
4 possible in the first quarter of 2018 until it sees the volume and substance of the *Daubert*  
5 motions and motions for summary judgment to be filed in late August. The Court and  
6 parties will address the scheduling of bellwether trials on October 5, 2017.

7           The Court advised the parties that it may be very difficult for the Court to conduct  
8 all six bellwether trials within a 12 or 18 month period, given the Court's docket and  
9 administrative responsibilities. The Court raised the possibility of enlisting other judges  
10 to try some of the bellwether cases. If such an approach were taken, the trials probably  
11 could be scheduled over the course of a year or 18 months, dates could be blocked out,  
12 and the other judges could be identified. The parties should address this issue in the joint  
13 report to be filed before the conference on October 5, 2017.

14           The Court advised the parties of its practices regarding a final pretrial conference  
15 and motions in limine. The Court also stated that it would be willing to entertain the  
16 possibility of juror questionnaires.

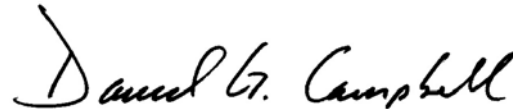
17           **I.     Other Matters.**

18           The Court and parties discussed choice of law issues that might arise in the  
19 bellwether cases. The Court asked the parties to discuss this issue and see if they can  
20 agree on a method for briefing. It may be that such briefing needs to occur as part of the  
21 summary judgment briefing, particularly since a choice of law will not be necessary  
22 unless the law of the possible jurisdictions is in conflict on specific points raised in the  
23 summary judgment briefing. If the parties need the Court's guidance on this matter  
24 before summary judgment briefs are filed, they may place a telephone call to the Court.

25           The Court will also require the parties to discuss bellwether summary judgment  
26 motions before they are filed on August 21, 2017. The purpose of such discussion will be  
27 to identify claims that Plaintiffs intend to assert in each of the bellwether cases and  
28 arguments Defendants intend to make with respect to such claims. The parties should

1 endeavor to focus and streamline the briefing wherever possible. If issues are to be  
2 addressed that apply to some or all of the bellwether cases, they should be briefed only  
3 once. The parties should also endeavor to make the statements of fact as efficient as  
4 possible.

5 Dated this 14th day of July, 2017.

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David G. Campbell  
United States District Judge  
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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8 IN RE: Bard IVC Filters Products Liability  
9 Litigation,  
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No. MDL 15-02641-PHX DGC

**CASE MANAGEMENT ORDER**  
**NO. 27**

13  
14 The Court held an eleventh case management conference on October 5, 2017. The  
15 conference addressed ongoing matters identified in the parties' joint report. Doc. 7854.

16 **A. Privilege Issues.**

17 Defendants asked the Court to require Plaintiffs to include in their privilege log  
18 any communications withheld from production that occurred between experts, even if  
19 they included a lawyer. After discussion, the Court declined to require a privilege log.  
20 Instead, Plaintiffs shall provide the Court all such communications that they have  
21 withheld, for *in camera* review. The Court will randomly select ten communications and  
22 review them for privilege. Plaintiffs shall provide these documents on or before  
23 **October 13, 2017.**

24 Defendants also expressed concern about the method used for collecting email  
25 communications among Plaintiffs' experts at Northwestern University. The Court  
26 directed Plaintiffs' counsel to communicate with these experts, particularly in light of one  
27 email that was provided by Defendants at the hearing, to ensure that all communications  
28 have been produced. Plaintiffs shall do so no later than **October 13, 2017.**

1           **B.     Motion Hearings.**

2           The Court will hold motion hearings on **November 17, 2017 at 1:00 p.m.,**  
3 **December 15, 2017 at 1:00 p.m.,** and **January 19, 2018 at 1:00 p.m.** These hearings  
4 will concern pending *Daubert* motions, motions to disqualify experts, and motions for  
5 summary judgment. The motion for summary judgment on preemption will be heard on  
6 **November 17, 2017 at 1:00 p.m.** The parties shall meet and confer regarding the  
7 motions to be heard on these dates and shall submit their joint proposal to the Court by  
8 **October 13, 2017.**

9           **C.     Scheduling of Bellwether Trials.**

10          The Booker bellwether trial will be held on **March 13-16, 20-23, and 27-30,**  
11 **2018.** The Jones bellwether trial will be held on **May 15-18, 22-25, and 29-30, and**  
12 **June 1, 2018.** The Court will schedule other bellwether trials, and will set dates for final  
13 pretrial conference in Booker and Jones, at coming status conferences.

14          **D.     Science Day.**

15          The Court held a “science day” on October 5, 2017. The parties agreed at the  
16 beginning of the discussion that it need not be on the record. Each side presented  
17 relevant information in support of their position on various science issues in the case.  
18 Each side also presented some information supporting their liability arguments in the  
19 case. The Court listened for the purpose of understanding issues it will need to address in  
20 upcoming motions hearings. The Court formed no view on the question of liability or the  
21 merits of any motion as a result of the hearing, and returned all exhibits to the parties at  
22 the end of the discussion.

23          **E.     Plaintiffs’ Motion for Partial Summary Judgment.**

24          Plaintiffs have filed a for summary judgment motion in the Jones case. Doc. 7363.  
25 Defendants stated at the conference that they have no opposition to the granting of the  
26 motion. The Jones Plaintiffs’ motion for partial summary judgment on Defendants’  
27 thirteenth affirmative defense (Doc. 7363) is therefore **granted.**





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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 IN RE: Bard IVC Filters Products Liability  
10 Litigation,  
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No. MDL 15-02641-PHX DGC  
**ORDER**

14  
15 At the tenth case management conference on July 13, 2017, the Court and parties  
16 discussed the discoverability of communications between Plaintiffs' experts, with the  
17 Court attempting to provide some guidance on its interpretation of Rule 26(b)(4).  
18 *See* Doc. 6765. The Court thereafter directed Plaintiffs to produce to Defendants all  
19 discoverable communications among their experts and to provide a privilege log that  
20 identifies the specific basis on which Plaintiffs conclude that any communications are  
21 protected under Rule 26(b). Doc. 6799 at 2.

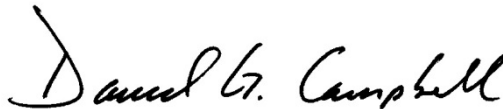
22 In their recent status report, the parties raised a dispute regarding Plaintiffs'  
23 production of the expert communications and privilege log. Doc. 7854 at 11-17.  
24 Plaintiffs state that they have produced all communications between attorneys and  
25 experts excepted from Rule 26(b)(4)'s protection and, with one exception, have produced  
26 every communication between experts even if attorneys were copied on the  
27 communications. *Id.* at 12. Defendants take the position that every communication from  
28 an expert either needs to be produced or listed on a privilege log. *Id.* at 13-14.

1 The dispute was addressed at the eleventh case management conference on  
2 October 5, 2017. *See* Doc. 8144. The Court declined to require a privilege log but, with  
3 the parties' consent, directed Plaintiffs to submit the expert communications withheld for  
4 *in camera* review of ten randomly selected communications. Doc. 8113 at 1. Plaintiffs  
5 provided the communications to the Court on October 13, 2017. *See* Doc. 8182.

6 The Court has completed its review and finds that the communications are  
7 protected by Rule 26(b)(4) and were properly withheld. *See Izzo v. Wal-Mart Stores,*  
8 *Inc.*, No. 2:15-cv-01142-JAD-NJK, 2016 WL 593532, at \*4 (D. Nev. Feb. 11, 2016)  
9 (finding that the withholding party met its burden of showing that expert-attorney  
10 communications did not fall within one of the exceptions to Rule 26(b)(4)(C)).

11 **IT IS ORDERED** that Plaintiffs need not produce the withheld expert  
12 communications or provide a privilege log on these communications to Defendants.

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14 Dated this 20th day of October, 2017.

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19 David G. Campbell  
20 United States District Judge  
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